UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 4

WYMAN GORDON PENNSYLVANIA, LLC

and

CASES 04-CA-182126
04-CA-186281
04-CA-188990

UNITED STEEL, PAPER AND FORESTRY
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION, AFL-CIO-CLC

CHARGING PARTY UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC'S POST-HEARING BRIEF

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I. INTRODUCTION

Over the course of fifteen months of bargaining for a first contract, the Respondent, Wyman Gordon Pennsylvania LLC ("Employer"), failed to respond to much of the comprehensive September 2015 proposal offered by Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC ("Union"), including crucial economic items. The Employer's refusal to offer its positions on these proposals, after the Union began demanding them in August 2016, violated Section 8(a)(5) of the Act.

Also in August 2016, the Employer unlawfully unilaterally failed to give an established, unit-wide annual wage increase. It did so without notifying the Union in advance and affording the Union an opportunity to bargain. This violated Section 8(a)(5) of the Act. The Employer subsequently failed, refused, and delayed to provide relevant information requested by the Union.

The Employer also unilaterally laid-off employees on light duty, including the Union's president, for several days in mid-October 2016. This, too, was done without advance notice and an opportunity to bargain, in violation of Section 8(a)(5) of the Act.

Further, the Employer maintained a confidentiality policy that inhibited protected activity by forbidding employees from disclosing any employee information to anyone, and it consistently arrived late for bargaining sessions.

The Employer's unfair labor practices tainted its November 29, 2016, withdrawal of recognition of the Union. In addition, the Employer withdrew recognition based solely upon an employee petition that contained a large number of signatures on pages that contained no indication of employees' sentiments regarding the Union. Because it thus lacked an objective

basis for concluding that these employees did not wish to be represented, the Employer's withdrawal of recognition was unlawful, independent of any taint.

II. STATEMENT OF FACTS

The Union won an election to represent employees at a Plains, Pennsylvania, manufacturing facility operated by the Employer in May 2014. The Board certified the Union as the representative of all production and maintenance employees on April 14, 2015. (04-RC-126196).

A. The parties met prior to bargaining to address healthcare renewal in May 2015, and the Employer gave employees a wage increase in late July 2015 in accordance with its established practice.

Well before the parties met for their first official bargaining session, the Employer asked the Union for a meeting to discuss healthcare. (Tr. 49-50, 341).[1] The Union agreed, and the parties met in May 2015. (Tr. at 49; 341, 704). The Employer explained that it needed to renew the healthcare plan in June, and the parties discussed the issue. (Tr. at 50).

On about July 29, 2015, before the parties met for their first bargaining session, the Employer also granted an annual wage increase of $0.50 to all bargaining-unit employees effective July 27, 2015. (Tr. at 62; G.C. Ex. 15). This annual pay increase was in accordance with the Employer's established practice. The Employer granted such wage increases annually from 2003 through 2015, a total of thirteen years. (G.C. Ex. 15; G.C. Ex. 19). For at least the six-year period of 2010 through 2015, the Employer made the wage increases effective the

[1] References to the hearing transcript are noted as "Tr." The General Counsel's exhibits are abbreviated "G.C. Ex." The Employer's exhibits are abbreviated "Er. Ex." The Employer's bargaining notes, (Er. Ex. 3), span multiple days and are unfortunately unpaginated. Specific bargaining dates are referenced in the following format: "Er. Ex. 3 (DATE)."

Monday of the week of the first day of August.[2] (G.C. Ex. 12; G.C. Ex. 13; G.C. Ex. 14; G.C. Ex. 15; G.C. Ex. 24; G.C. Ex. 25). Over at least the four-year period of 2012 through 2015, the wage increases actually were announced to employees before August 1. (G.C. Ex. 12; G.C. Ex. 13; G.C. Ex. 14; G.C. Ex. 15). The record does not contain information about the dates of announcements prior to that period. The amount of the wage increases varied, but over the period 2006-2015, the raise was always in the range of $0.50-$0.70. (G.C. Ex. 15; G.C. Ex. 16).

B. The Union presented a comprehensive proposal at the parties' first bargaining session.

The parties met for their first official bargaining session on September 17, 2015. Union Sub-District Director Joseph Pozza ("Pozza") and bargaining-unit employees Brian Collura ("Collura"), the Union's unit president, Gerald Ziminiskas, and Michael Kersavage, initially represented the Union. (Tr. 47, 342). Starting in late May 2016, Dave Moore, a local union official at the Employer's nearby Mountain Top facility, attended sessions on behalf of the Union. (Tr. 342; Er. Ex. 3 (5/26/16 *et seq*.)). In August 2016, after the Employer failed to give the August annual wage increase, Union attorney Nathan Kilbert ("Kilbert") also began attending bargaining sessions. (Tr. 342).

Rick Grimaldi ("Grimaldi") served as the Employer's attorney and main spokesperson throughout bargaining. Leah Leikheim ("Leikheim"), the Employer's Human Resources Administrator, attended all of the bargaining sessions and served as the Employer's note-taker. (Tr. 205-206). Leikheim testified that she took handwritten notes during each session and typed these notes during caucuses. (Tr. 207). Brad Georgetti ("Georgetti"), the Regional Human Resources Manager, and Tim Brink ("Brink"), the Plant Manager, also regularly attended

[2] In 2009, the wage increase was effective August 3, which was the first Monday after Saturday, August 1. (G.C. Ex. 23).

sessions. (Tr. 342). Human Resources person Dan Dottar, Human Resources attorney Brian Keegan, and Area Manager Matthew Troutman also attended the first session on behalf of the Employer. (Er. Ex. 3 (9/17/15)).

At the first session, the Union presented a comprehensive proposal that covered over 30 economic and non-economic topics. (Tr. 311-312, 343; G.C. Ex. 4; G.C. Ex. 26). Grimaldi stated that the Employer would review the Union's proposal. (Er. Ex. 3 (9/17/15)).

The Employer then distributed proposed ground rules for the negotiations. (*Id.*). The parties spent the rest of the first session negotiating the Employer's proposed ground rules and ultimately signed a ground rules agreement. (*Id.*; G.C. Ex. 8). Ground rule number 5 stated, in part, "[l]anguage proposals will be discussed prior to the discussion of economic proposals." (G.C. Ex. 8). The ground rules did not state that the resolution of all language proposals was required before economic proposals could be discussed, and the Employer's notes do not reflect any discussion to that effect in the course of negotiating the ground rules. (Er. Ex. 3 (9/17/15)).

C. At the parties' second session, the Company failed to provide a single response to the Union's initial comprehensive proposal. By the end of bargaining, the Company had failed to provide its position on many mandatory subjects of bargaining.

The Union and the Employer met for their second bargaining session on October 15, 2015. (Er. Ex. 3 (10/15/15)). The Employer did not have a response prepared for any of the Union's proposals. (*Id.*). Instead, the Employer caucused for three hours to review the comprehensive proposal that the Union had presented almost three weeks earlier. (*Id.*).

When the Company returned from its caucus, it did not present any proposals. Grimaldi stated that the Union had taken "the best of Mountaintop and Tru-Form and put them together" and proposed that the parties "take a look and work off of this [the Union's comprehensive

proposal]?" (*Id.*). He proceeded to go through each article of the Union's proposal and indicate whether the Employer would counter or table each item. (*Id.*). Grimaldi stated that the parties would table the economic items. (*Id.*). He promised a counter on almost all of the language issues. (*Id.*). Grimaldi testified that he did not give the Employer's substantive positions on the Union's proposals at this meeting. (Tr. 706-707).

By August 26, 2016, over eleven months after the Union first presented its comprehensive proposal, the Employer had only responded to seven topics. (Tr. at 343; G.C. Ex. 26). On that date and thereafter (as explained in more detail below), the Union repeatedly demanded responses to all of its outstanding proposals. (Er. Ex. 3 (8/26/16; 10/26/16; 10/27/16; 11/5/16; 11/10/16; 11/17/16); Tr. 357; G.C. Ex. 27; G.C. Ex. 28; G.C. Ex. 29). Despite these demands, the Employer never provided its responses to all of the Union's proposals. The Employer provided responses to five items in September 2016, three items the following month, and only one item in November. (G.C. Ex. 26). By the time the Employer withdrew recognition on November 29, 2016, the Employer had failed to respond to eight of the Union's language proposals. (G.C. Ex. 26). With the exception of jury duty and bereavement leave, the Employer never responded to any of the economic proposals in the Union's September 2015 proposal.[3] (G.C. Ex. 26).

D. The Employer demanded to discuss healthcare renewal and stated that it would not tie wage increases to healthcare.

[3] As discussed in more detail below, there was bargaining over the 2016 annual wage increase and the employee health insurance contributions on an explicitly interim basis, and not for the wages and benefits in a final agreement, as Georgetti admitted at the hearing. (G.C. Ex. 32; Tr. 361-362, 590). The Employer also offered its proposal for a new lead classification and an associated rate on November 17, 2016. (G.C. Ex. 41).

Although the Employer refused to provide its responses to the vast majority of the Union's economic proposals, the Employer was anxious to discuss economics when it proposed to make immediate changes that benefitted it. For example, at the parties' April 28, 2016, session, Grimaldi announced that the Employer had to renew its healthcare plan on June 1 and that "[w]e will spend a large portion of our [next] meeting on the 16th dedicated to [healthcare] benefits." (Er. Ex. 3 (4/28/16)).

At the May 16, 2016 session, the Employer informed the Union that its rates for the Geisinger HMO and PPO plans had increased by about 6 percent. (Er. Ex. 3 (5/16/16)). The Employer then proposed dramatically increasing employee premium contributions to 30 percent of the total premium for the HMO plan (from 3-5 percent) and to 35 percent for the PPO plan (from 16-17 percent). (*Id.*; Er. Ex. 53). These proposals, and all of the other proposals regarding health insurance contributions that the Employer discussed in bargaining, were solely on an interim basis while bargaining for an overall agreement continued. (Tr. 590; G.C. Ex. 32). The Union countered with a small increase to the employees' current contribution levels. (Er. Ex. 3 (5/16/16)).

The parties met again on May 26, 2016. Pozza asked the employer if it would offer a wage raise to offset the increase in healthcare premiums. (Er. Ex. 3 (5/26/16)). Grimaldi said no and stated that wages were not related to healthcare: "We are not going to tie wages to Healthcare. We will have a wage increase proposal at the appropriate time." (*Id.*). The parties exchanged several proposals but did not reach an agreement. (*Id.*).

After this meeting, the Employer increased employee healthcare premium contributions slightly. (Tr. 593). At the next session, on June 13, 2016, the Employer continued to request that the parties bargain over employee premium contributions. (Er. Ex. (6/13/16); Tr. 217). The

parties spent much of this session discussing the Employer's proposal to implement higher healthcare premiums. (Er. Ex. 3 (6/13/16)). At the next session, on July 12, 2016, the Employer again raised the topic of healthcare and made an additional proposal. (Er. Ex. 3 (7/12/16); Er. Ex. 53). Subsequently, on August 12, the Union wrote to the Employer and stated that it was "not interested in any proposal from the Company to increase employee contributions while negotiations for an overall agreement are ongoing" but emphasized that "there are further discussions to be had regarding employees' health insurance as part of an overall agreement." (G.C. Ex. 2).

E. The Employer did not provide bargaining-unit employees with the annual wage increase. After the Union threatened to file an unfair labor practice charge, the Employer agreed to bargain and then delayed, failed or refused to provide information relevant to bargaining.

In contrast to the Employer's eagerness to discuss increasing employee health insurance contributions, the Employer entirely failed to notify the Union that it would not follow its past practice of announcing, before August 1, an annual wage increase to bargaining-unit employees to be effective no later than August 1. In August 2016, when the parties were engaged in bargaining, the Employer did not provide this established wage increase. (Tr. 147, 303). The Employer did not notify the Union in advance of this decision or of anything else related to the wage increase. (Tr. 373, 473). Georgetti testified that he became aware of the wage increase practice only shortly before the end of July. (Tr. 608). But there was no explanation for why the Employer did not reach out to the Union regarding the issue beyond Grimaldi's statement that Pozza had previously rejected the idea of bargaining by email regarding health insurance premium contributions. (Tr. 673).

The failure to receive the annual raise caused consternation among the employees and prompted inquiries from employees to management. (Tr. 60-61). Current unit employee Stephen Lewis ("Lewis") asked Georgetti why the Employer had not provided the annual raise. (Tr. 303). Lewis testified that he wanted to ask management because "a bunch of us were talking on the floor about why we were not getting a raise this year, or why we weren't informed of the raise." (Tr. 303-304). Georgetti replied that the raise "was in negotiations" with "you know who," referring to the Union. (Tr. 304-305). Current unit employee Adam Mewhort ("Mewhort") also asked the Employer why it had not provided the annual wage increase. Brink, the Plant Manager at the time, responded that the employees "weren't receiving raises at that time because the Union was currently negotiating for us." (Tr. at 147). Although Georgetti and Brink both testified for the Employer, neither denied these exchanges.

At the August 12 bargaining session, the Union presented a letter demanding that the Employer bargain over its unilateral change and threatening to file an unfair labor practice charge. (G.C. Ex. 2). The Union proposed a $1.00 interim increase and requested information about the Employer's past compensation practices, including the date and amount of any bonus payments and the formula the Employer used to calculate those bonuses. (*Id.* (requests 2, 4, and 5)). The Union needed the bonus information in order to understand the Employer's total compensation practices. (Tr. 377). As Kilbert explained at the hearing:

> . . . [W]e had made a proposal in our September 2015 proposal regarding the QCB [quarterly cash bonus], and we hoped to bargain about it. So we wished to receive that information. With respect to the wage increase issue . . . these quarterly cash bonuses were sometimes significant in amount, and so they were part of the employees' total compensation. We wanted to understand how they would vary in the future, how much they had been, so that we could try to understand how best to bargain about wage rates as part of the overall employee compensation.

(Tr. at 385-386).

The Employer belatedly offered to bargain about the August wage increase with the Union. (Er. Ex. 3 (8/12/16); G.C. Ex. 37). The Employer orally countered the Union's proposal of $1.00 with zero. (Tr. 374; Er. Ex. 3 (8/12/16)). The Union responded with $0.95. (Tr. 374; Er. Ex. 3 (8/12/16)). At the end of the session, the Employer countered with $0.03. (Tr. 374; Er. Ex. 3 (8/12/16)). All of the Employer proposals were for increases "while we continue to negotiate," that is, for the August annual wage increase, pending further discussions about wages for the actual contract. (Er. Ex. 3 (8/12/16)).

The parties met again on August 26, 2016. Kilbert attended this session on behalf of the Union and asked about the Employer's failure to provide the annual raise. Grimaldi explained that the increase in healthcare premiums "impact[ed] the raise." (Er. Ex. 3 (8/26/16)). Georgetti agreed, stating that "wages and healthcare have to come together." (*Id.*). Additionally, Grimaldi explained that the Employer's customers would not understand a 15% price increase. (Tr. 391). The statement seemed significant to Kilbert, who requested confirmation that the Employer did not want to pass along labor costs to its customers. (Tr. 391). Grimaldi agreed and stated that the Employer "had to remain competitive."[4] (Tr. 391). Grimaldi and Georgetti also confirmed that the parties had never discussed the interim wage increase before. (Er. Ex. 3 (8/26/16)).

The Employer made a proposal of $0.10 as a wage increase "on an interim basis during collective bargaining negotiations." (G.C. Ex. 32; Tr. 374). The Union countered the Employer's last wage increase proposal with $0.60 retroactive to August 1. (Er. Ex. 3 (8/26/16); Tr. 374; G.C. Ex. 32). The Employer stated that it would provide a counter at the next session. (Er. Ex. 3 (8/26/16)). The Employer also promised responses to the Union's August 12 information request. (*Id.*).

[4] Although the Employer at various times disputed this exchange, Grimaldi later acknowledged that the Employer had "stated at the table that no customer would understand a 15% price increase." (G.C. Ex. 38).

The Union sent an additional information request on August 31, 2016. In a letter, the Union also reiterated its request for the information requested in its August 12 letter. (G.C. Ex. 27). Among other things, the Union wanted to understand the Employer's comments at the August 26 bargaining session that the wage increase was related to healthcare costs. (Tr. 386-387). The Union sought "all health insurance plans, summary plan descriptions, and employee and employer premium contributions for plans applicable to unit employees in 2013, 2014, 2015, and 2016." (G.C. Ex. 27 (request 3)). Insurance plans are complete descriptions of the plan, while a summary plan description is a short description that summarizes the benefit. (Tr. 388, 598-599). The Union also sought the Employer's communications with employees as part of health insurance open enrollment. (G.C. Ex. 27 (request 8)). The Union wanted to understand whether and how the two issues of health benefits and wages "had been linked in communications to employees so that we could better understand employees' expectations with respect to how health insurance premiums and benefits linked to wage increase." (Tr. at 387).

The parties met again on September 1, 2016. The Employer provided an interim wage counter of $0.12 "on an interim basis during collective bargaining negotiations" that also included an interim employee health insurance premium contribution component "pending continued negotiations for purposes of the collective bargaining agreement." (G.C. Ex. 32). Kilbert reminded the Employer that the Union needed responses to its information requests in order to evaluate the Employer's counter. (Er. Ex. 3 (9/1/16)). Grimaldi stated that the Employer would attempt to answer the Union's August 12 information request that day and would respond to the August 31 request "piecemeal." (*Id.*).

The Employer did provide a partial response to the Union's August 12 request at the September 1 session. (*Id.*). Kilbert pointed out that the Employer did not provide any

information about its bonus program. (*Id.*). Grimaldi promised to provide the mechanism that the Employer used to calculate employee bonuses. (*Id.*).

The Union submitted an additional information request on September 6, 2016. (G.C. Ex. 36). The Union asked for information about the Employer's price of products, any changes to those prices, and the identities of the Employer's competitors. The Union wanted this information to verify the Employer's August 26 assertions regarding the impact of labor costs on its prices and on the Employer's ability to remain competitive. (Tr. 391-393). If it were true that a similar wage increase to the raises given in prior years would have rendered the Employer non-competitive, this would have informed the Union's bargaining position. (Tr. 393).

The parties met again on September 12, 2016. At this session, the Employer provided partial responses to the Union's August 12 and August 31 information requests. (Er. Ex. 3 (9/12/16)). The Employer stated that most of the information responsive to the Union's September 6 request was confidential and irrelevant, and it provided a letter to that effect. (*Id.*; G.C. Ex. 37). Kilbert offered to negotiate a confidentiality agreement. (Er. Ex. 3 (9/12/16)). Grimaldi refused, stating that the information was not relevant. (*Id.*). The Employer's letter also refused to provide the information the Union had requested regarding bonuses on the ground that it was not relevant to the bargaining regarding the wage increases. (G.C. Ex. 37).

At this session, Grimaldi stated that the Company did "not want" to provide an increase comparable to past years. (Er. Ex. 3 (9/12/16)). Specifically, Grimaldi said, "It's not that they [Wyman Gordon] are not willing to do it, its [sic] that they do not want to do it." (*Id.*). Later in the session, Grimaldi stated that, "the company has made some mistakes in the past and this process has brought forth those mistakes and now is a good time to correct those mistakes." (*Id.*). The Union orally stated its proposal for the wage increase was still $0.60. (Tr. 375;

Er. Ex. 3 (9/12/16)).

The Employer provided certain information responsive to request 3 of the Union's August 31 information request on September 12. It provided the requested premium contribution information, summary plan descriptions for plans available during the period June 1, 2013 through 2016, and written communications related to open enrollment for health insurance in 2015 and 2016. (Er. Ex. 20; Er. Ex. 61; Tr. 387-389). The Employer never provided the insurance plans, the summary plan description for the plan applicable from January 1, 2013, through May 31, 2013, or for written communications related to open enrollment for 2013 or 2014. (Tr. 387-388, 599). By letter dated September 21, the Union pointed out the Employer's failure to provide the written open enrollment communications for 2013 and 2014. (G.C. Ex. 35). There was no response to this to reminder. (Tr. 390).

In a letter dated September 21, 2016, the Union wrote to explain that its September 6 requests for pricing and competitiveness information were designed to verify the Employer's statements about competitiveness and customer sensitivity to pricing. (G.C. Ex. 35). In another letter, dated October 17, 2016, the Union reminded the Employer again that it had not responded to various items in the Union's previous information requests and specifically identified the bonus information as not having been provided. (G.C. Ex. 28). At the September 22 bargaining, the Employer offered $0.15 for the August wage increase, as well as an interim measure regarding employee health insurance contributions. (G.C. Ex. 32; Tr. 375).

Bargaining for the interim wage increase continued on October 26, with the Union offering a proposal. (Er. Ex. 3 (10/26/16); G.C. Ex. 32). In response to renewed requests for the bonus information at this session, Grimaldi initially stated that the bonus information was irrelevant, and then agreed to provide the individual bonus amounts and the formula the next

day. (Er. Ex. 3 (10/26/16)). He claimed that the numbers the Employer plugged into the formula were confidential. (*Id.*). Again, Kilbert offered to negotiate a confidentiality agreement and, again, Grimaldi refused. (Tr. 380-381; Er. Ex. 3 (10/26/16)).

Later in the session, Grimaldi told Kilbert, for the first time, that the bonus formula was in the employee handbook, already provided to the Union. (Er. Ex. 3 (10/26/16); Tr. 379). This handbook stated that the bonus program described therein was effective "only for FY13," that is, for fiscal year 2013. (Tr. 379; G.C. Ex. 33).

At the next day's session, the Employer provided some of the bonus payment amounts. (Er. Ex. 3 (10/26/16); G.C. Ex. 34). Kilbert asked a few questions about the bonus formula provided in the employee handbook and pointed out that the handbook's formula was vague and did not actually explain how the Employer calculated individual employees' bonus amounts.[5] (Tr. at 379). Grimaldi responded that, "[w]hat we are talking about is above all of our pay grades, we can put together a condensed formula. I will pledge that I will do my best to get you this information before our next meeting." (Er. Ex. 3 (10/27/16)). Later on October 27, Kilbert emailed to point out that the Employer had not provided a complete list of individual bonus payments and to reiterate the Union's requests for both the formula for calculating the bonus payments and the input data used in those calculations. (G.C. Ex. 34; Tr. 377). On November 1,

[5] At the hearing, Grimaldi testified that it was possible to calculate individual employees' bonus payments using the description of the program in the handbook, although he admitted that he could not do it personally. (Tr. 706, 743). A review of the handbook description makes clear that this testimony is mistaken. (G.C. Ex. 33). The handbook describes a calculation beginning with plant operating profits (adjusted in an unspecified way by the Plant VP/GM), deducting minimum shareholder return (an unknown number with no apparent source), and applying the "sharing percentage of remaining profits into bonus pool." (*Id.*). There is no explanation of what a "sharing percentage" might be. (*Id.*). After arriving at a bonus pool, there is a calculation of a bonus percentage arrived at by dividing the bonus pool by bonus payroll. (*Id.*). After this, there can be additional "site specific modifiers . . . to drive focus on areas of importance" such as "Quality, Delivery, Attendance, and Safety." (*Id.*).

The QCB payment data reflects that each individual employee's payment differs from every other employees' payments. (G.C. Ex. 34). As the Union expressed on October 27, there is no explanation in the handbook of how the (apparent) site-wide bonus percentage is applied to individual employees to calculate the individual employee's payment, and there is no explanation of how the "site specific modifiers" affect such a calculation. (Tr. 379).

Grimaldi sent Kilbert an email stating that he would forward "a more accurate description of the bonus formula" once he received it from the Employer. (G.C. Ex. 34). Attached to this email was the complete individual bonus information. (*Id.*; Tr. 377).

The Employer never provided the accurate bonus formula or the input data. Three sessions after the October 27 meeting, Kilbert reminded the Employer that it had promised to provide a more thorough explanation of the bonus calculation formula. (Tr. 382). Georgetti responded, "I'm still working on that." (Er. Ex. 3 (11/17/16); Tr. 382). The Employer never provided the formula and the Union consequently did not understand how the Employer calculated the bonus payments. (Tr. 382-382).

The parties did not reach an agreement on the August 2016 wage increase before the Employer withdrew recognition of the Union and terminated bargaining.

F. The Union repeatedly requested that the Employer provide responses to its original September 2015 proposal. The Employer delayed or refused to provide responses.

The Employer failed to offer any response to many of the Union's initial, September 2015 proposals. As described above, the Union presented a comprehensive proposal covering over 30 topics at the parties' initial bargaining session. By the time Kilbert joined the table on August 26, 2016, the Employer had only responded to seven of these topics. (Tr. 343; G.C. Ex. 26). Two of these topics were economic: paid leave for bereavement and jury duty. (Tr. 315-316).

At the August 26 session, Kilbert reminded the Employer that it had not provided its position on the majority of the Union's proposals. (Tr. 355; Er. Ex. 3 (8/26/16)). Kilbert demanded responses on all proposals, both economic and non-economic, and listed some specific proposals to which the Employer had not responded. (*Id.*). Grimaldi referenced the ground rules

to state that the Employer would not respond to economic proposals until non-economic items were resolved. (Tr. 355-356; Er. Ex. 3 (8/26/16)). Kilbert responded that he did not believe the agreement required the parties to finish non-economic negotiations before beginning to discuss economics. (Tr. 356). Kilbert also pointed out that several items, like Vacation, had economic and non-economic aspects and suggested that the parties discuss the process for scheduling vacation. (Tr. 356; Er. Ex. 3 (8/26/16)). Kilbert then listed many non-economic topics to which the Employer had yet to respond, including Recognition, Grievances, Arbitration, Payday, Job Posting, Federal and State Laws, New Classifications and Rates, Rights and Assignments, Termination and Reopening, Timekeeping, and Safety and Health. (Er. Ex. 3 (8/26/16)). In addition to these topics, the Employer had not responded to Seniority, Military Service, and Protective Equipment, or to the following economic topics: Reporting Pay, Call-in Pay, Insurance Benefits, Wages and Hours,[6] Holidays, Wage Increases During the Contract,[7] 401(k) Plan, Layoff and Severance Policy, Payday, Flexible Spending, COBRA, Employee Assistance, Educational Refund, and Wage Rates and Classifications.[8] (G.C. Ex. 26). The Employer countered Recognition at that session, but not any of the other outstanding topics. (Tr. at 357; Er. Ex. 3 (8/26/16)).

The Union sent a letter on August 31, 2016, "reiterat[ing] its statements at the table last Friday that we wish to know the Company's position on all issues contained in our September 2015 proposal to which the Company has not yet provided a response." (G.C. Ex. 27). At the next session, on September 1, 2016, Kilbert again requested responses to outstanding items.

[6] The Union's Wages and Hours proposal addressed the definition of the workweek and shifts, and addressed how the Employer would assign and pay overtime. This proposal had nothing to do with the annual August wage increase. (Tr. 372; G.C. Ex. 4, p. 15-19).

[7] The Union's Wage Increases During the Contract proposal stated that the Employer had the right to increase wages during the term of the contract. This proposal had nothing to do with the annual August wage increase. (Tr. 372; G.C. Ex. 4, p. 29).

[8] The Union's Wage Rates and Classifications proposal listed the classifications and associated wage rates. This proposal did not reference the annual August wage increase. (Tr. 372-373; G.C. Ex. 4, p. 43).

(Er. Ex. 3 (9/1/16)). The Employer provided its position on Grievances, Arbitration, and State and Federal Laws, but nothing on any of the other outstanding issues from the Union's September 2015 proposal to which the Employer had not yet responded. (Er. Ex. 3; G.C. Ex. 26). At the September 12, 2016 session, the Employer gave a partial counter to the Union's Seniority proposal, only responding to the proposal's definition of seniority. (Tr. 353; Er. Ex. 3 (9/12/16); G.C. Ex. 26). The Employer also provided a counter to Job Postings for the first time. (G.C. 26).

The Union sent another letter on October 17, 2016, demanding responses to all of the Union's outstanding proposals, both economic and non-economic. (Tr. 364; G.C. Ex. 28). In this letter, the Union stated that it believed the Employer had withdrawn from the parties' ground rules and that, in any event, the ground rules had "outlived its usefulness." (G.C. Ex. 28). At the hearing, Kilbert (who drafted the letter) explained:

> So the Employer had at various points stated its belief that the ground rules agreement prevented any discussion of economics before language issues had been resolved. And so this was -- this paragraph was my attempt to convince the Company, number one, that we're already talking about economic issues. And so it's not appropriate for the Employer to rely upon a supposed agreement about ground rules to privilege its refusal to discuss economic issues that the Union wished to discuss.
>
> And, secondly, the purpose of this passage was to illustrate to the Employer that, you know, even assuming that its position were correct, that those ground rules were, in fact, now impeding the progress of bargaining and ought to be set aside so that we could have a full and frank discussion about all the issues that were in play.

(Tr. 364-365).

At the next session after the Union sent this letter, October 26, 2016, Kilbert again demanded responses to the Union's economic proposals. (Tr. 366; Er. Ex. 3 (10/26/16)).

Grimaldi stated that the Employer would not provide economic responses that day. (*Id.*). Kilbert reminded the Employer that it had not responded to many of the Union's non-economic proposals, like Safety. (*Id.*). Grimaldi asked for more time, even though the Union had presented its initial proposals over a year before this meeting and had repeatedly demanded responses since. (Tr. 355, 357; Er. Ex. 3 (10/26/16)). During this session, Kilbert emailed Grimaldi to list a large number of items to which the Employer had yet to offer a response and to reiterate the Union's desire to receive the Employer's responses to all such issues. (G.C. Ex. 29). Grimaldi responded to say "I believe some of these, at least as they relate to language, should be easy agreements. We will start putting together proposals. Many of them are, of course, tied to overall economics." (*Id.*). At this session, the Employer did provide its positions (for the first time) on Payday, Employee Assistance, and Military Service. (G.C. Ex. 26).

The parties met again the next day. The Employer raised the new topic of flu shots, and the parties reached an agreement on flu shots at that session. (Er. Ex. 3 (10/27/16)). The Employer did not provide responses to any of the Union's outstanding proposals to which it had not previously given a counter-proposal. (G.C. Ex. 26). At this session, Georgetti stated, in response to the Union's requests to discuss health insurance, that the Employer was only interested in discussing that topic on an interim basis. (Tr. 361-362). The Employer was unwilling to discuss how it would be handled in a collective bargaining agreement. (*Id.*).

At the next session, on November 5, 2016, Pozza asked if the parties could move to discussing economics. (Er. Ex. 3 (11/5/16)). In response, Grimaldi refused and referenced the charge the Union had filed alleging that the Employer's Confidentiality Statement was unlawful:

> . . . [T]he board [sic] reached out us, as they do, and it was relative to the "Electronic Communications" policy and the "Media Contact" policy in the Handbook. So what this had brought to our attention is that we need to review the entire Handbook . . . So, I have to thank you, I guess, because now we have to

> look at the Handbook as a subject of negotiations, so that's what we plan to do over the next 2 sessions . . . So this in essence throws a wrench into things . . . We need to negotiate the Handbook. I can't tell you when we will have an economic package. We will get there but these things just keep getting in the way.

(*Id.*).

Despite the Employer's claim that the Union's charge prevented it from negotiating economics, the Employer briefly initiated a discussion of its idea of creating two new Lead positions in the bargaining unit. (*Id.*). The Employer stated that it would provide a written proposal with a proposed pay rate at the next session. (*Id.*). The Employer did not provide any responses to parts of the Union's September 2015 proposal to which it had not previously responded. (*Id.*; G.C. Ex. 26).

The Employer did not provide any responses to those parts of the Union's September 2015 proposal at the next session, either. (Er. Ex. 3 (11/10/16); G.C. Ex. 26). Pozza raised a number of questions regarding the Employer's suggestion for a new lead position, which the Employer still had not made in writing. (Er. Ex. 3 (11/10/16)). Grimaldi again claimed that the Union's unfair labor practice charge was obstructing negotiations: "This is a silly ULP. He [Kilbert] keeps bringing these things up and they just get in the way, I guess I have to thank Nate [Kilbert] because now we have to sit here and negotiate the Handbook." (*Id.*).

After lunch, Pozza again demanded responses to the Union's economic proposals. (*Id.*). Pozza explained that the Union wished to discuss the lead position as part of an overall discussion about economics. (*Id.*). The Employer did not respond to the Union's economic proposals. (*Id.*).

At the final session, on November 17, 2016, the parties spent the first two hours discussing plant regulations. (Er. Ex. 3 (11/17/16). Again, Grimaldi referenced the Union's ULP

as an obstacle to negotiations: "Some of these [plant rules] we have talked about and they are going to have to get addressed in the renegotiated handbook. You brought forward the ULP to us and we have to start negotiating things like this going forward." (*Id.*).

At this session, Kilbert again reminded the Employer that it had yet to respond to many of the Union's proposals. Kilbert explained that the Union needed to understand the Employer's economic position in order to productively negotiate:

> Let me also mention that we have a very strong desire to discuss Economics, we feel that the time has come, it's been well over a year and we have had some discussion regarding them. We feel that it may give us some more flexibility on Non-Economic proposals. Now, you all raised issues on the new classification,[9] we would love to see a few proposals for all classifications and pay rates. We've got a number of Non-Economic proposals like layoff, which you've given us [*sic*][10] a hybrid of Non-Economic proposals like vacation and we would like to see proposals on all of those items as soon as possible.

(*Id.*). Grimaldi responded that, "we will work on it." (*Id.*).

The Employer only responded to one outstanding proposal at the last session: the reduction in force part of the Union's Seniority proposal (the Employer had responded to the definition part on September 12, 2016). (Tr. 353, 367-368, G.C. Ex. 30). As part of this proposal, Grimaldi explained that the Employer planned to propose a "performance standard review process" that would inform the order in which the Employer would recall employees on layoff. (Er. Ex. 3 (11/17/16); Tr. 368; G.C. Ex. 30). The Employer did not plan on presenting this performance review proposal, however, until the parties began negotiating economics. Grimaldi stated, "That will be part of a greater economic proposal, which we will present to you

[9] As discussed *supra*, the Employer had raised the suggestion of a new lead classification at the two preceding sessions. The Employer made a written proposal on the new lead classification for the first time later at this session. (G.C. Ex. 26; G.C. Ex. 30).

[10] This was a recording error on Leikheim's part. In fact, the Employer had not given a proposal on Layoffs or Vacation at the time of this statement. The Employer's notes reflect that the Employer gave a counter-proposal on Layoffs later that day, and the Employer never gave a proposal on vacation. (Er. Ex. 3 (11/17/16); G.C. Ex. 26).

all at the same time." (Er. Ex. 3 (11/17/16)). Kilbert explained that the Union could not accept this proposal without seeing the economic piece. (*Id.*). In response, Grimaldi promised to provide the performance evaluation standard. (*Id.*). None was ever provided. (Tr. 369).

The Employer did not respond to any other proposals from the Union's September 2015 proposal to which it had not already responded. By the end of this session, the Employer had not responded to the following items: Reporting Pay, Call-in Pay, Insurance Benefits, Wages and Hours, Vacation, Holidays, Wage Increases During Contract, New Classifications and Rates, 401(k) Plan, Rights and Assigns, Layoff and Severance Policy, Termination and Reopening, Timekeeping, Flexible Spending, COBRA, Educational Refund, Wage Rates and Classifications, Safety and Health, and Protective Equipment. (Er. Ex. 3; G.C. Ex. 26; Tr. 369-370). As Kilbert explained at the hearing:

> It was going to be very difficult to reach any kind of agreement absent knowing the Employer's position on the various topics in that [the Union's comprehensive] proposal. You know, there's no way to bargain if the other side won't tell you what its position is. I don't know how to do that . . .
>
> Q. As of November 29, 2016, the date that the Company withdrew recognition, could the Union have signed a contract agree[ment] with the Respondent?
>
> A. No, we didn't know what the Employer's position was with respect to all of these items, many of which were key components in any collective bargaining agreement.

(Tr. 367, 370).

G. The Employer unilaterally laid off light-duty employees.

Before the Employer withdrew recognition from the Union, it laid off light duty employees. On October 14, 2016, Employer representatives telephoned five employees on light duty, including Unit President Collura, to inform them that they should not report to work until

they had a change in their medical condition.[11] (Tr. 64). The Employer claimed that at the time, there was not enough work to support the number of employees on light duty. (Tr. 64). Collura, however, had performed light-duty work since January 2016 and was the only light-duty employee who worked on the facility's equipment. (Tr. 63, 65). The other employees on light duty were production employees engaged in the manufacture of the Employer's end product. (Tr. 65). The Employer had never told employees on light duty that they should not report to work before October 2016. (Tr. 398).

The Union objected to the unilateral change and demanded to bargain over the light duty program in a letter dated October 17. (G.C. Ex. 28). The Employer called Collura and told him to report back to work on Wednesday, October 19. (Tr. 68). There had been no change to Collura's medical condition; his doctor had not lifted Collura's medical restrictions. (Tr 68). Collura returned to performing the exact same tasks he had performed before the Employer suspended the program. (Tr. 68). Georgetti testified that the individuals on light duty were brought back "to the same conditions to which they left." (Tr. 602).

At the hearing, Georgetti testified that a member of management had acted independently to send employees on light duty home. (Tr. 583). He stated that when he found out about this, he consulted with Grimaldi and determined that it was necessary to recall the employees to work because the Employer was "concerned that we would have got a unfair labor practice charge." (Tr. 583, 601). He testified that he did so "immediately" and that he "instructed the area manager and the HR generalist to bring them back, like today." (Tr. 601-602). This is inconsistent with the fact that Georgetti wrote to Collura, Brink, Leikheim, and environmental health and safety manager Elizabeth Griffiths ("Griffiths") at 10 a.m. on October 17 regarding

[11] The affected employees were Collura, Dave Gretz, Donald Emerick, Byron Filipkowski, and Foday Sillah. (Tr. 64).

the light-duty policy. (G.C. Ex. 3). In that email, Georgetti expressed his agreement with an earlier email from Griffiths that stated "Many factors are considered when offering light duty but most importantly we want our injured workers to recuperate from their work related injury and return to their pre-injury condition." (*Id.*). Georgetti added "As communicated to each employee on Friday and in accordance to policy any employee who has a change to their current work restrictions will contact Leah [Leikheim] for review and determination." (*Id.*). This correspondence (and the fact that it occurred on Monday morning, when employees were not returned to work until Wednesday, October 19) directly contradicts Georgetti's testimony that Griffiths acted independently and that he "immediately" instructed that employees be returned to work "like today." (Tr. 601-602)

At the bargaining table on October 26, and in a letter hand-delivered on that date, the Employer claimed that the change to the light duty program was a "miscommunication." (Tr. 399; G.C. Ex. 21). Grimaldi stated that bargaining had given the Employer an opportunity to reevaluate the light-duty program:

> It appears we have there is [sic] no motivation for individuals to get better; when those employees are sent to IME's [sic] [independent medical examinations] those injuries are not getting better. This has given us the ability to take a good hard look, there is zero motivation for employees to come back to work. So we wanted to have some discussion to the value of a Light Duty program.

(Er. Ex. 3 (10/2616)). Kilbert asked if the Employer had a proposal on light duty. (*Id.*). The Employer did not have a proposal and never provided one.[12] (*Id.*). The Employer did not reference the light-duty policy or claim that it was following its policy during bargaining. (Tr. 399).

[12]Grimaldi testified that the Union did not want to negotiate about the light duty policy. (Tr. 735). This is inconsistent with the Employer's own notes, which reflect that Kilbert asked whether the Employer had a proposal on light duty on October 26, (Er. Ex. 3 (10/26/16)), and with the Union's letter demanding to bargain over light duty. (G.C. Ex. 28).

Collura testified that bargaining-unit employees discussed the suspension of light duty and because "it's a small plant, when anything happens, pretty much we talk about what's going on." (Tr. 69). Collura further testified that everyone was surprised that the Employer had temporarily suspended the program. (Tr. 69). Collura also testified that the Employer only reimbursed him for two of the three days he missed, and that he understood this had occurred for unit employee Foday Sillah, as well. (Tr. 65-66).

H. The Employer's unfair labor practices eroded support for the Union.

The Employer's refusal to engage in bargaining on the Union's economic proposals, its failure to pay the August 2016 annual wage increase, its suspension of the light-duty program, and its refusals to provide relevant information for bargaining took a toll on employee support for the Union. The Union held a meeting for unit employees in October 2015, shortly after bargaining began, that was attended by approximately a dozen employees. (Tr. 81). A year later, while the Employer's unfair labor practices were ongoing, only about six employees attended a second meeting. (Tr. 81). Starting in August 2016, the Union sent regular bargaining updates via email to employees who had told Collura that they wanted to receive them. (G.C. Ex. 6; G.C. Ex. 7; Tr. 79-80). In mid-November 2016, the Union mailed a letter to all unit employees asking them to text Collura to give feedback on the Union's negotiating position on the August 2016 annual wage increase. (G.C. Ex. 6 ("2016 Wage Increase Update, Your Vote Needed"); Tr. 400). Only about six employees responded to this request by texting Collura. (Tr. 77-78).

I. The Employer withdrew recognition based on a petition including signatures on loose pages with no heading.

Several weeks after the Employer called light-duty employees back to work, the Employer withdrew recognition from the Union. Grimaldi sent Pozza a letter, informing him that bargaining-unit employees had provided the Employer with "objective evidence" that a majority of bargaining-unit employees no longer wanted Union representation. Grimaldi's letter specifically discussed a petition provided to the Employer and then stated that, "[t]he withdrawal is based on the above-mentioned evidence that the Union has, in fact, lost majority support." (G.C. Ex. 22). At the hearing, the Employer testified that its withdrawal was solely based on the petition. (Tr. 236, 532).

Grimaldi attached the petition to his letter. (G.C. Ex. 22). The petition consisted of five pages. The first and last pages included a heading stating that the undersigned employees no longer wanted Union representation. The second, third, and fourth pages, however, had no heading at all. Instead, these pages only had lines for a signature, name, and date. Fourteen employees signed the petition on the blank pages; nine signed on the pages with headings. Twenty-three employees signed the petition in total, out of 43 in the unit at the end of November 2016. (Er. Ex. 2; Er. Ex. 36).

As explained below, testimony regarding the solicitation of signatures is irrelevant because the Employer based its withdrawal only on the petition and did not conduct any investigation into the circumstances of the signature collection. Bargaining-unit employee William Berlew ("Berlew") testified that he downloaded the petition after Brink gave him the phone number for the National Right to Work Foundation. (Tr. 172-173). Berlew further testified that he circulated the petition in October 2016 and personally obtained seven signatures, besides his own. (Tr. 174-175). Berlew personally obtained Steven Brotzman's ("Brotzman") signature. (Tr. 757; Er. Ex. 2). Brotzman signed on one of the pages with no heading, and he

described the page as "a white paper with I believe two sets of rows of lines with maybe I'm going to say anywhere from six to ten signatures on it on just the one side." (Tr. 757). Brotzman testified that Berlew did not explain the purpose of the petition. (Tr. 758). Berlew also testified that all of the employees "silently signed the page." (Tr. 194). Brotzman believed that he was signing a petition to hold "another vote," not to withdraw recognition from the Union. (Tr. 758).

According to Berlew, he handed the petition in the manila envelope to bargaining-unit employee Josh Antosh ("Antosh"), and Antosh gave the envelope to bargaining-unit employee Mike Shovlin ("Shovlin"). (Tr. 176). Shovlin testified that he received the petition from bargaining-unit employee Jonathan Buselli. (Tr. 805). Shovlin obtained almost all of the remaining signatures and eventually returned the petition to Berlew. (Tr. 175-177). Shovlin testified that the petition was in the front seat of his truck and that he personally witnessed "each guy that is on here . . . I witnessed with my own eyes sign this paper,", including Don Crispell ("Crispell"). (Tr. 811, 816). Crispell, however, testified that it was impossible to see inside the truck and that Shovlin was outside walking around the parking lot. (Tr. 802). Shovlin further testified that petition signers read the cover page before signing on the next page with an available signature line. (Tr. 814-816, 818). Shovlin could not explain why Joe Petorak, Bryan Filipkoski, and Greg Cook did not sign on the second page of the petition, which had blank lines, and instead signed on the third page. (Tr. 819-820). He theorized that he "might have shuffled these [pages] back, and he [Filipkoski] didn't look at the entire front page of this, or when he went through, he may have just seen that Petorak had signed it." (Tr. 820). He also testified that "I don't know what they were looking at as far as -- you know, they saw a name that they were familiarized with most likely and signed a piece of paper." (Tr. 820).

Berlew and Shovlin both testified that the petition signers did not explain why they signed the petition. (Tr.179, 792). Such evidence is not relevant in this proceeding, but at the hearing, bargaining-unit employee Mewhort explained that he signed the withdrawal petition because "the negotiations weren't getting us anywhere . . . we were fucking losing things . . . as far as our money . . . we hadn't gotten raises yet." (Tr. 149-150).

III. ARGUMENT

A. The Employer's withdrawal of recognition was unlawful because the Employer relied solely on a petition that included signatures on loose pages with no heading. The Employer therefore lacked objective evidence of a loss of majority support.

The Employer stated in its withdrawal letter and in the hearing that it relied solely on the petition when it decided to withdraw recognition from the Union. Under *Levitz Furniture Co.*, 333 NLRB 717 (2001), an employer may only withdraw recognition if it has objective evidence that the union has lost the support of the majority of bargaining-unit employees. *Id.* at 725. The Employer has the burden to prove that it based its decision to withdraw recognition on this objective evidence. *Latino Express, Inc.*, 360 NLRB 911, 925 (2014) ("where an employer seeks to justify its withdrawal of recognition based [on] the proof of the Union's loss of majority support, it is the employer's burden to prove the loss of majority support"); *Levitz*, 333 NLRB at 725 ("if the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition"). If the Employer fails to carry this burden, the withdrawal is unlawful. *Flying Food Grp., Inc.*, 345 NLRB 101, 144-145 (2005) (withdrawal of recognition unlawful because employer "failed to meet its burden of proving that the union had actually lost majority support").

Even if an employer has objective evidence that seems to establish that a union has lost majority support, the employer still "withdraws recognition at its peril." *Highland Reg'l Med. Ctr.*, 347 NLRB 1404, 1406 n. 15 (2006), *enfd.* 508 F.3d 28 (D.C. Cir. 2007) (internal citations omitted). "[I]n withdrawing recognition, an employer assumes the risk that the evidence it relies on for its decision will later be determined not to show actual loss of majority status." *Id.* If an employer is faced with ambiguous evidence, it has the option of filing for an election rather than withdrawing recognition. *Liberty Bakery Kitchen, Inc.*, 366 NLRB No. 19, slip op. 1 n.1 (2018).

Here, the Employer did not file for an RM petition and chose to withdraw recognition instead. The Employer did not have the objective evidence necessary to lawfully withdraw recognition from the Union. The Employer relied entirely on the petition that contained the majority of signatures on three blank pages with no headings. The Employer did not know whether the fourteen employees who signed on the second, third, and fourth pages actually wanted the Employer to unilaterally withdraw recognition from the Union.

Such ambiguity renders a withdrawal petition invalid. In *Liberty Bakery*, for example, the employees signed a document explaining how an employer could lawfully withdraw from a union and how to seek a decertification election. The Board upheld the ALJ in finding the withdrawal unlawful, "emphasiz[ing] that the document the Respondent relied on in withdrawing recognition contained no statement of the employees' desires concerning union representation." 366 NLRB at slip op. 1 n.1. And in *Anderson Lumber Co.*, employees signed a petition stating that they wanted to terminate their union membership. 360 NLRB 538 (2014), *enfd.* 801 F.3d 321 (D.C. Cir. 2016). The ALJ found the employer's subsequent withdrawal of recognition unlawful and the Board affirmed this decision. The ALJ reasoned that a desire to terminate

union membership did not necessarily mean that these employees no longer desired union representation. *Id.* at 542.

In the cases above, employees signed petitions that had ambiguous headings. The Board found withdrawal unlawful because these headings did not clearly indicate that the employees no longer wanted union representation. Here, the pages with a majority of signatures had *no* heading at all. The Employer therefore lacked any objective evidence that the employees who signed on these pages understood that they were asking the Employer to withdraw recognition from the Union.

At least one Administrative Law Judge has found that signatures on a blank petition page do not constitute the necessary objective evidence that would allow an employer to lawfully withdraw recognition. In *Superior Coffee and Foods, Inc.*, a case decided under the more employer-friendly, pre-*Levitz* standard, a number of employees signed two blank pieces of paper. 2000 WL 33664324, Case 13-CA-38164 (NLRB Div. of Judges, July 21, 2000). At some point, an employee added "no union" to one of these pieces of paper. The ALJ found that the employer unlawfully withdrew recognition based on this petition:

> It has long been established Board law that to establish a good-faith doubt an employer must show that this doubt is based on objective considerations, rather than unfounded speculation or a subjective state of mind . . . In order to establish a good-faith doubt on the basis of these documents, the evidence must demonstrate a clear intention by the employees not to be represented by the Union . . . The "petitions" herein do not establish that Superior had such a reasonably grounded good faith doubt. The second shift "petition" is nothing more than a blank piece of paper with 24 signatures on it. Respondent could not possible have inferred that the employees signing this document no longer wished for the Union to represent them . . . The first shift petition suffers from a similar defect . . . Given that fact that "No Union" appears on the right hand side of the page and 26 signatures appear on the left hand side of the page, I conclude that it was not reasonable for Valvo, without adequate investigation as to circumstances under which the document was prepared, to conclude that this document indicated a

> desire by any employee . . . to discontinue union representation. On this basis alone, I conclude that Superior lacked a reasonably-grounded good faith doubt as to the Union's majority status.

Id.; *see also Royal Midtown Chrysler Plymouth, Inc.*, 296 NLRB 1039, 1041 (1989) ("in order to establish a good-faith doubt as to majority status the evidence must demonstrate a clear intention by the employees not to be represented by the union") (internal citations omitted).

The Employer may point to Berlew's and Shovlin's testimony and argue that the employees who collected signatures always kept the loose pages of the petition together, and that the signers read the cover page. There are two problems with this argument. First, the evidence does not establish that the petition signers understood the purpose of the document. Berlew collected three signatures that appear on blank pages: Brotzman's, Brian Mikolosko's, and Robert Wallace's. (Tr. 175). Notably, Berlew did not testify that these signers read the heading on the first page. He could have handed them one of the blank pages without an adequate explanation of the purpose of the petition. Indeed, Brotzman testified that he thought he was signing to obtain another election. (Tr. 758).

Further, Shovlin's testimony was confusing and contradicted by other witnesses. Shovlin claimed that he personally witnessed each signer read the cover page and sign his name. (Tr. 811, 816). Crispell, in contrast, testified that Shovlin was walking around the parking lot while bargaining-unit employees were signing the petition and that it was impossible for Shovlin to see inside the cab of Shovlin's truck, where the petition was signed. (Tr. 802). Further, Shovlin initially claimed that the petitions signers read the cover page and flipped to the next available spot to sign. (Tr. 815-816, 818). Shovlin, however, could not explain why Petorak, Filipkoski, and Cook did not sign on the second page with available signature lines and theorized that Filipkoski and Cook did not read the cover page and just signed the third page because they

recognized Petorak's name. (Tr. 819-820). Shovlin further admitted that "I don't know what they were looking at." (Tr. 820).

Second, and more importantly, the Employer based its decision to withdraw recognition solely on the petition itself. There is no evidence in the record that the Employer spoke with the employees who signed the blank pages or conducted any investigation as to how the petition passed from employee to employee. Plant Manager Tim Brink testified that he verified the signatures; the Employer did not introduce any other evidence of an additional investigation. (Tr. 525).

An employer cannot rely on after-the-fact evidence to justify its decision to withdraw recognition. In assessing whether an employer lawfully withdrew recognition, the Board only examines evidence of which the employer was aware and that the employer actually relied upon when it made the withdrawal decision. *Anderson*, 360 NLRB at 544; *Seaport Printing & Ad Specialties Inc.*, 344 NLRB 354, 357 & n.8 (2005), *enfd.* 192 Fed. Appx. 290 (5th Cir. 2006); *RTP Co.*, 334 NLRB 466, 469 (2001), *enfd.* 315 F.3d 951 (8th Cir. 2003). Accordingly, the Board has declined to consider hearing testimony from petition signers about their intentions or understandings when they signed the petition. *CoServ. Elect.*, 366 NLRB No. 103, slip op. 3 n. 10 (2018); *Highland*, 347 NLRB at 1416 n. 17. This analysis makes sense. Allowing employers to rely on post-withdrawal evidence would lead "to the incongruous result that an employer could withdraw recognition even where the evidence before it does not demonstrate that a union had actually lost majority status, in the hope that it would unearth evidence in time for the unfair labor practice hearing." *Pac. Coast Supply, LLC v. NLRB*, 801 F.3d 321, 333 (D.C. Cir. 2015), *quoting* NLRB brief.

The evidence that the Employer in this case unearthed in time for the unfair labor practice hearing, testimony from petitions signers regarding the passing of the petition and their motivations for signing, is irrelevant to assessing the lawfulness of the Employer's withdrawal of recognition. This testimony does not establish that the petition signers understood the purpose of the document. In fact, Brotzman's and Shovlin's testimony indicated the opposite. Regardless of the substance of this testimony, the Employer did not have this information when it decided to withdraw recognition and cannot rely on it now. The Employer relied solely on a facially defective petition when it decided to withdraw recognition. The Employer lacked objective evidence of the Union's loss of majority support, and its withdrawal was unlawful on that basis alone.

Any argument that the General Counsel did not adequately plead that the Employer's withdrawal was unlawful because it lacked objective evidence of a loss of majority support is foreclosed by controlling law. In *Flying Food*, the Board found that the employer unlawfully withdrew recognition solely because the employer failed to establish that the union had actually lost majority support. 345 NLRB at 103. The employer argued to the agency and to the D.C. Circuit that the complaint failed to specifically allege that the employer lacked objective evidence of a loss of majority support. *Flying Food Grp. v. NLRB*, 471 F.3d 178, 183 (D.C. Cir. 2006); 345 NLRB at 154-155. The D.C. Circuit upheld the Board and dismissed this argument. The D.C. Circuit explained:

> Although the complaint did not expressly aver that the union retained majority support, it did not have to. Under *Levitz*, there is a "continuing presumption of an incumbent union's majority status," and the contention that an incumbent union has lost its majority status is "an affirmative defense," which the employer "has the burden of establishing." 333 NLRB at 725. Because a "plaintiff is not required to negate an affirmative defense in his complaint," *Tregenza v. Great Am. Commc'ns Co.*, 12 F.3d 717, 718 (7th Cir.1993), the allegation of unlawful

> withdrawal was pleaded sufficiently. *See Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980) (finding "no basis for imposing on the plaintiff an obligation to anticipate [an affirmative] defense by stating in his complaint" its negative); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1276 (3d ed. 2004) (explaining that "allegations that seek to avoid or defeat a potential affirmative defense ... are not an integral part of the plaintiff's claim for relief and lie outside his or her burden of pleading").

Id. at 183. Thus, the General Counsel was not required to specifically plead that the Employer lacked objective evidence of a lack of majority support for the Union.

Indeed, even if a complaint might be interpreted in multiple ways, the D.C. Circuit recognized that pleading standards are relaxed in administrative proceedings. 471 F.3d at 183. "[I]t is sufficient if the [party] understood the issue and was afforded full opportunity to justify its conduct during the course of the litigation." *Id.* (internal quotations omitted). The Court noted that the parties' conduct during the litigation indicated that the employer was on notice of its burden to rebut the presumption of continuing majority support. *Id.* at 183-184. In this case, too, the conduct of the General Counsel and the Employer amply demonstrates that the Employer was aware of this burden. The General Counsel pled that the Employer unlawfully withdrew recognition of the Union (Am. Comp. ¶ 14(a)), and Paragraph 14 of the Employer's Answer to Amendment to Consolidated Complaint contended that it did so on the basis of a petition signed by a majority of unit employees. (G.C. Ex. 1). Further, counsel for the General Counsel made clear in its opening statement that it intended to hold the Employer to its burden of proof on this point. (Tr. 24). The General Counsel filed a Motion in Limine during the hearing elaborating on the Employer's burden of proof. (G.C. Mot. in Limine, Apr. 25, 2016). During the course of the hearing, the Employer presented many witnesses specifically aimed at satisfying its burden of proof, including Berlew, Antosh, Finch, Crispell, Shovlin, and Cegelka. It is thus apparant that

the Employer understood the issue and was afforded every opportunity to justify its conduct. The Employer simply failed to carry its burden.

B. The Employer unlawfully failed to pay the August 2016 annual wage increase on August 1.

Uniform wage increases on August 1 of each year were a term and condition of employment, and the Employer's failure to pay the wage increase on August 1, 2016, without advance notice and an opportunity for the Union to bargain, was an unlawful unilateral change. Annual wage increases are conditions of employment when they are "'an established practice . . . regularly expected by the employees.'" *Mission Foods*, 350 NLRB 336, 337 (2007), *quoting Daily News of L.A.*, 315 NLRB 1236, 1236 (1994), *enfd.* 73 F.3d 406 (D.C. Cir. 1996). When the Board considers an Employer's practice of granting structural, uniform raises to all unit employees, the inquiry focuses upon two criteria: (1) the number of years the program has been in effect, and (2) the regularity with which the raises are granted.[13] *Burrows Paper Corp.*, 332 NLRB 82, 87 (2000); *see also Mission Foods*, 350 NLRB at 337; *Rural/Metro Med. Servs.*, 327 NLRB 49 (1998). When the employer's practice has been in effect a substantial number of years[14] and takes place at the same time every year, it constitutes a term or condition of employment. *Burrows*, 332 NLRB at 87.

The Employer's practice at the Plains facility was both of significant duration and highly regular. It had granted uniform wage increases for many years at the beginning of August. The Employer's records reflect that wage increases were granted each year from at least 2003

[13] When the increases are not uniform across the unit but are the product of individualized performance evaluation, the Board also considers whether the criteria used in determining the wage increase are fixed. *Burrows*, 332 NLRB at 87 Here, where all unit employees received raises in the same amount, this criterion is inapplicable. *Id.*

[14] As little as two years can be enough to support a finding that a wage increases is an established term of employment. *See Kurdziel Iron of Wauseon, Inc.*, 327 NLRB 155, 155 (1998), *enfd. per curiam* 208 F.3d 214 (6th Cir. 2000).

through 2015. (G.C. Ex. 15; G.C. Ex. 19). That is thirteen years of wage increases. The timing of the increases was quite regular, as well. For at least the six-year period of 2010 through 2015, the Employer made the wage increases effective the Monday of the week of the first day of August.[15] (G.C. Ex. 12; G.C. Ex. 13; G.C. Ex. 14; G.C. Ex. 15; G.C. Ex. 24; G.C. Ex. 25). Over at least the four-year period of 2012 through 2015, the wage increases were announced to employees before August 1. (G.C. Ex. 12; G.C. Ex. 13; G.C. Ex. 14; G.C. Ex. 15). These regular wage increases were expected by unit employees and constituted an established term or condition of employment.

The Employer failed to pay the wage increase in the week of August 1, 2016. It did so without providing the Union with notice and an opportunity to bargain in advance. Because its practice of granting a wage increase at this time each year was an established term or condition of employment, its "failure to grant this raise [at this time] constituted a unilateral change in an established term or condition of employment which was a mandatory subject of bargaining." *Burrows*, 332 NLRB at 87, s*ee also United Rentals, Inc.*, 349 NLRB 853, 853-55, 858-59 (2007); *Kurdziel*, 327 NLRB at 155; *WAPA-TV*, 317 NLRB 1159, 1159-60 (1995), *enfd.* 82 F.3d 511 (1st Cir. 1996); *Daily News*, 315 NLRB at 1236; *Hyatt Regency Memphis*, 296 NLRB 259, 286-87 (1989), *enfd. in relevant part* 939 F.2d 361 (6th Cir. 1991); *Cent. Me. Morning Sentinel*, 295 NLRB 376, 376 (1989); *Advertiser's Mfg. Co.*, 280 NLRB 1185, 1195-96 (1986), *enfd.* 823 F.2d 1086 (7th Cir. 1987); *Med. Ctr. at Princeton*, 280 NLRB 948, 948 (1984), *enfd. mem.* 760 F.2d 259 (3d Cir. 1985).

The Employer cannot argue that its violation of the law should be overlooked because it would have committed an unfair labor practice if it had simply paid a wage increase on August 1,

[15] In 2009, the wage increase was effective August 3, which was the first Monday after Saturday, August 1. (G.C. Ex. 23).

2016, without first bargaining with the Union regarding the discretionary amount of the increase. This is true but irrelevant. It does not excuse the Employer's violation of the Act. As the Board explained in detail in *Hyatt Regency Memphis*, the Act requires an employer in this situation to bargain *in advance* with the employees' representative over the amount of the increase.[16] 296 NLRB at 286 n.34. Although the Employer here was perfectly capable of taking this course, which it followed in May 2015 and May 2016 with respect to employee health insurance renewals, it chose not to do so with respect to the August 2016 wage increases. The holding of *Hyatt Regency Memphis* thus controls in the instant case.

The Employer's subsequent bargaining with the Union over the subject of the August 2016 wage increases did not cure its violation of the Act. "The bargaining philosophy of the Act requires that good-faith negotiations precede rather than follow changes in bargainable conditions of employment." *Cent. Ill. Public Serv. Co.*, 139 NLRB 1407, 1417 (1962), *enfd.* 324 F.2d 916 (7th Cir. 1963). An employer's willingness to bargain regarding a change after the employer has already implemented it "d[oes] not eradicate the initial violation inherent in its unilateral action." *Id.*; *see, e.g., Eltec Corp.*, 286 NLRB 890, 893 fn. 9 (1987), *enfd*. 870 F.2d 1112 (6th Cir. 1989), *cert. denied* 110 S.Ct. 235 (1989) ("We know of no authority for the proposition that such after-the-fact bargaining satisfies the statutory bargaining obligation."); *Schmidt-Tiago Constr. Co.*, 286 NLRB 342, 343 fn. 6 (1986) ("Such opportunity for future bargaining, after unilateral implementation, would not in any event cure the violation."); *Granite City Steel Co.*, 167 NLRB 310, 316 (1967) ("[B]argaining after the fact is not good-faith compliance with the statute; nor did such bargaining- operate to expunge the effects of the unfair

[16] Indeed, under *TXU Electric Co.*, 343 NLRB 1404 (2004), the Employer could have implemented its desired policy with respect to the wage increase if it had given the Union advance notice and an opportunity to bargain over the wage increase, even in the absence of an overall impasse. *Id.* at 1407. However, this course is not available to an employer that fails to provide the bargaining representative with reasonable advance notice and an opportunity to bargain over the intended change, as the Employer failed to do in this case. *United Rentals*, 349 NLRB at 854 n.11.

labor practices found."); *Ark. La. Gas Co.*, 154 NLRB 878, 896 (1965) ("Good-faith bargaining is not bargaining after the fact."). This is so even though the Employer subsequently offered to make the wage increase retroactive to August 1, 2016. The Board has explained that after-the-fact bargaining over a change is inadequate because, once a change is in place, "a union is relegated to the status of a supplicant, a position incompatible with the purposes and policies of the Act." *Kajima Eng'g & Constr., Inc.*, 331 NLRB 1604, 1620 (2000). That is precisely what occurred in the instant case.[17]

C. The Employer unlawfully refused to discuss certain mandatory subjects, including wages and benefits.

Although it had over a year to do so, the Employer unlawfully failed to respond to 19 of the topics in the Union's September 2015 proposal. Its failure to respond continued despite the Union's repeated demands to know the Employer's position on these topics, including key issues like safety, vacations, holidays, and the wage rates over the course of the contract. This amounted to a refusal to bargain regarding these and other mandatory subjects in violation of Section 8(a)(5) of the Act.

It is hornbook law that a party is obligated to bargain upon request regarding mandatory subjects. *Raytheon Network Centric Sys.*, 365 NLRB No. 161, slip op. 4 (2017) (recognizing this as well-established law). At its most basic level, a party's failure to state its position regarding a

[17] Although the Employer granted employees a $0.15 per hour wage increase, retroactive to August 1, 2016, in approximately December 2016 or January 2017 (Tr. 62, 549), the question of the appropriate remedy should be resolved in the compliance phase of the proceedings. *See Mission Foods*, 350 NLRB at 338 n.7; *Hyatt Regency Memphis*, 296 NLRB at 259 n.2. Note that fifteen cents is substantially less than the amounts of all annual raises granted prior to 2016, which ranged from $0.50 to $0.70 cents over the period 2005-2015 (G.C. Ex. 15; G.C. Ex. 16).

mandatory subject upon request is inconsistent with the Act's requirement, in Section 8(d), that the parties "confer" with respect to mandatory subjects. The Supreme Court stated in *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952), that the essence of collective bargaining is "frank statement and support of [a party's] position." *Id*. at 404. Indeed, the Supreme Court has also stated that the parties must refrain from behavior that is "in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion." *NLRB v. Katz*, 369 U.S. 736, 747 (1962). A failure to offer a position on a particular subject upon request is effectively a refusal to negotiate that directly inhibits the process of discussion.[18] *See Teamsters Local Union 122*, 334 NLRB 1190, 1254 (2001) (refusal to offer proposals on economics despite persistent requests was unlawful); *Viking Connectors Co.*, 297 NLRB 95, 106 (1989) (employer's delay in offering proposal despite union's requests was an independent 8(a)(5) violation); *Whisper Soft Mills, Inc.*, 267 NLRB 813, 813-815 (1983), *enf. denied on other grounds*, 754 F.2d 1381 (9th Cir. 1984) (employer's refusal to make a timely wage offer, where the union repeatedly asked for one, frustrated bargaining and amounted to a refusal to bargain); *Clear Pine Mouldings, Inc.*, 238 NLRB 69, 78 (1978), *enfd.* 632 F.2d 721 (9th Cir. 1980), cert. denied, 451 U.S. 984 (1981) (unlawful to delay making a long-term wage offer where union sought to bargain on the subject); *Case Concrete Co.*, 220 NLRB 1306, 1309 (1975) (finding unlawful employer's delay in responding to union's contract proposal and observing that "[bargaining for a first contract] can be especially impeded by the failure or the refusal of the parties to respond to demands or take positions on contract proposals").

The Employer in this case failed and refused to offer responses to many elements of the Union's September 2015 proposal. This unlawfully inhibited the bargaining process.

[18] No finding of overall bad faith is required. *See Viking Connectors Co.*, 297 NLRB at 106; *Whisper Soft Mills*, 267 NLRB at 814-815 (noting that there was no allegation of overall bad faith and finding that the employer "failed to make a timely wage offer in violation of Section 8(a)(5) and (1) of the Act").

1. *The Employer refused to respond to many of the Union's September 2015 proposals, relying in part on the parties' ground rules to excuse its refusal to respond to most of the Union's economic proposals.*

Despite many requests from the Union, the Employer failed to state its positions on the subjects addressed in a large number of the Union's proposals. Of the approximately 35 subjects in the Union's September 2015 proposal, the Employer provided its positions on about 16 over the course of over a year of bargaining. (G.C. Ex. 26; Tr. 344-346). The employer never stated its positions on approximately 19 topics, including vacations, holidays, wages, and benefits. (G.C. Ex. 26; Tr. 344-346).

The Employer insisted on tabling the Union's economic proposals until non-economic issues had been resolved. In doing so, it relied on a ground rule providing that "Language proposals will be discussed prior to the discussion of economic proposals." (G.C. Ex. 8). Grimaldi admitted on cross-examination that "throughout the negotiations," he maintained that "economics were tabled, and obviously, per the ground rules, that we preferred to do language first." (Tr. 727-728). With respect to health insurance and wages, the Employer bargained over the conditions that would prevail during the negotiations, but it refused to state its positions regarding the benefits and wages that would be embodied in a collective bargaining agreement. (Tr. 361-362; G.C. Ex. 23 (including the Employer's proposals for the August 1, 2016, wage increases "on an interim basis during collective bargaining negotiations" and employee contributions to health insurance "pending continued negotiations")).

The Union asked time and again for the Employer to give its responses to all of the proposals originally made by the Union in September 2015. The Union made this request at the table on August 26, 2016, listing a number of subject areas, (Tr. 355-356; Er. Ex. 3 (8/26/16)), and it followed up with a letter on August 31. (G.C. Ex. 27). In that letter, the Union stated it

"wishes to reiterate its statements at the table last Friday that we wish to know the Company's positions on all issues contained in our September 2015 proposal to which the Company has not yet provided a response. . . . You have had our proposals for nearly a year, so it is not too much to ask for you to provide a response on all such open items." (G.C. Ex. 27). In a letter dated September 12, 2016, the Employer refused even to respond to the Union's request for information about bonus payments until "such time as the Parties negotiate overall economics for the collective bargaining agreement." (G.C. Ex. 37). The Union reiterated its demand to discuss all outstanding topics by letter dated October 17. (G.C. Ex. 28).

At succeeding bargaining sessions, the Union continued to ask for the Employer's positions on subjects addressed in the Union's September 2015 proposal to which the Employer had yet to respond. The Union again raised the issue on October 26, demanding to receive the Employer's position on issues in the Union's September 2015 proposal to which the Employer had not yet responded. (Tr. 366; Er. Ex. 3 (10/26/16)). The Union even sent an email listing a large number of subjects to which the Employer had yet to offer a response and stating that it wished to receive the Employer's responses. (G.C. Ex. 29). The Employer responded to say "We will start putting together proposals. Many of [the identified areas] are, of course, tied to overall economics." (*Id.*).

On October 27, November 5, and November 10, the Union again asked the Employer to provide its responses to the Union's September 2015 proposals. (Er. Ex. 3 (10/27/16); (11/5/16); (11/10/16)). On November 5, Grimaldi responded to the Union's inquiries about moving to discuss the Union's economic proposals by pointing to the Union's unfair labor practice charge regarding the Employer's handbook provision and saying that this would postpone the Employer's ability to discuss economics. He went on to say "I can't tell you when we will have

an Economic package. We will get there but these things just keep getting in the way." (Er. Ex. 3 (11/5/16)). At the following session, on November 10, the Union again asked for the Employer's economic proposals. (Er. Ex. 3 (11/10/16)).

At the final session, on November 17, the Union reiterated its desire to receive the Employer's proposals on issues that had not yet been discussed. The Employer's own notes reflect that the Union issued a strong call for the discussion of the Union's economic proposals and the outstanding non-economic proposals:

> We have a very strong desire to discuss Economics, we feel that the time has come, it's been well over a year and we have had some discussion regarding them. We feel that it may give us some more flexibility on Non-Economic proposals. Now you all raised issues on the new classification,[19] we would love to see a few proposals for all classifications and pay rates. We've got a number of Non-Economic proposals like layoff, which you've given us [*sic*][20] a hybrid of Non-Economic proposals like vacation and we would like to see proposals on all of those items as soon as possible.

(Er. Ex. 3 (11/17/16)). Later that day, the Employer presented a Layoff proposal that indicated that layoffs would be based partly upon a performance evaluation component, which Grimaldi explained "will be part of a greater economic proposal, which we will present to you all at the same time." (Er. Ex. 3 (11/17/16); G.C. Ex. 30; Tr. 367-369). Kilbert strenuously objected, noting that the Employer's insistence on discussing economics only after non-economics had been resolved was fragmenting the negotiations and inhibiting the Union's ability to evaluate the Employer's non-economic proposals. (Tr. 368-369; Er. Ex. 3 (11/17/16)). The Employer indicated it would provide the performance evaluation proposal, but it never did so. (Tr. 369; Er. Ex. 3 (11/17/16)).

Grimaldi's belated and self-serving attempts to characterize discussions regarding presently-prevailing conditions, in the context of other issues, as bargaining about vacations and

[19] *See* note 9, *supra*.
[20] *See* note 10, *supra*.

new classifications, are essentially an admission that the Employer did not have a lawful reason for failing to discuss these issues. On cross-examination, Grimaldi testified that the discussions characterized as bargaining in his chart, prepared for the purpose of justifying the Employer's position in this litigation, (Er. Ex. 63; Tr. 640-641), were actually elaborations of the Employer's current practices. (Tr. 714-715, 729). The Employer's own notes reflect this as well. (Er. Ex. 3 (9/12/16); (10/26/16); (10/27/16)). It is telling that the Employer never actually offered any written proposals on these subjects, as Grimaldi admitted, although he testified that he told the Union that the Employer could give a counter on vacation. (Tr. 712-713, 733).

Further undercutting Grimaldi's attempts to re-characterize certain Employer proposals as responsive to the Union's September 2015 proposal is the fact that the Employer never told the Union that it believed it had responded to the Union's proposals. The Employer never responded to the Union's repeated accusations that it was failing to respond to the Union's proposals by stating that it had already done so. For example, Grimaldi's chart reflects that the Employer's November 12, 2015, "Plant Regulations and Discipline" proposal was its response to the Union's proposal on Safety, despite the fact that its only relationship to safety was that it prescribed punishments for violations of forty different rules, among which only a few dealt with safety. (Er. Ex. 56; Er. Ex. 63). But when the Union wrote on August 31, 2016, that the Employer had not responded to its proposals on Safety and Health, the Employer did not say that its rules proposal was its response on the subject. (G.C. Ex. 27). Similarly, the Employer's own notes reflect that Grimaldi pleaded "give me some time" when Kilbert stated, on October 26, that "We have many issues outstanding. We still have not received counters on many things, like Safety." (Er. Ex. 3 (10/26/16)). Indeed, when Kilbert wrote an email to Grimaldi that same day

identifying Safety and Health as an issue to which the Employer had yet to provide a response, Grimaldi said "Thank you. . . . We will start putting together proposals." (G.C. Ex. 29).

The October 26 email from Kilbert also listed Reporting Pay and Call-In Pay as items with respect to which the Employer had yet to offer a response. (G.C. Ex. 29). But Grimaldi did not say during negotiations that the Company's March 14 proposed attendance policy was its response to those proposals by the Union, as he later testified at trial. (Tr. 647-648, 721-722; Er. Ex. 63). Similarly, the Employer never asserted during negotiations that its interim wage proposal for the August 1, 2016, wage increase was its response to the Union's proposed Article XI, Wages and Hours, as Grimaldi's list contends. (Er. Ex. 63). Kilbert also explicitly listed this subject in his October 26 email. (G.C. Ex. 29). The same applies for the Union's "protective equipment," proposal, which the Union identified in the October 26 email but which Grimaldi identified as encompassed by the Employer's response to the Union's safety shoes proposal. (G.C. Ex. 29; Er. Ex. 64). A cursory review of the substance of the Union's proposals in these areas illustrates why the Employer never made such assertions during the negotiations: the proposals in fact dealt with different subjects. Call-in and Reporting pay addressed pay that an employee is guaranteed under certain circumstances, not penalties for failing to report to work. (G.C. Ex. 4, p. 8-9). The Union's Wages and Hours proposal dealt with a number of subjects, including shifts, temporary transfers, and overtime, but it did not include the August 1 annual wage increase. (*Id.*, p. 15-19). And even Grimaldi admitted that the Union's protective equipment proposal was broader than just safety shoes, which the Union had addressed in a separate proposal from its protective equipment proposal. (Tr. 720; G.C. Ex. 4, p. 31 & final pages numbered 2 and 3)).

2. *The Employer's failure to respond to many of the Union's non-economic proposals was unlawful.*

The Employer gave no reason for its failure to present its position in response to many of the Union's non-economic proposals. Rather, the Employer promised responses to the Union's non-economic proposals but failed to provide them. On October 26, 2016, over a year after the Employer received the Union's initial proposal, Grimaldi stated that the Employer would "start putting together proposals" after receiving yet another demand from the Union to discuss all outstanding topics. (G.C. Ex. 29).

At various points, the Employer's representatives stated that they were open to discussing non-economic items, including items like vacation scheduling, but the Employer simply failed to present its positions on those topics. (Tr. 356-358, 713). On August 26, the Employer stated that it could bargain over the vacation scheduling. (Er. Ex. 3 (8/26/16) (Kilbert: "We can discuss the process for vacation." Grimaldi: Yeah, we can talk about the process. Not number of weeks though.")). The Employer never offered a proposal on the subject in response to the process outlined in the Union's September 2015 proposal regarding vacation.

Although it repeatedly indicated that it would provide its responses to some elements of the Union's September 2015 proposal, the Employer simply failed to do so. This case is thus quite similar to *United Technologies Corp.*, 296 NLB 571 (1989), in which the Board observed that "[b]ecause the Respondent … had not completed drafting its proposed contract language, the Union could not have agreed to a contract prior to the withdrawal of recognition even if it had capitulated to the Respondent's every demand." *Id.* at 572. Here too, the Union could not have achieved a contract even if it agreed to every proposal the Employer offered, because the Employer simply failed to present its proposals. Such a failure to state the Employer's in the face of the Unions efforts to discuss the subjects is effectively a refusal to discuss the subject.

Even if the Employer had only delayed discussing these subjects, rather than failing to do so, ample precedent supports the conclusion that extended and unjustified delay in discussing mandatory subjects, in the face of the other party's efforts to discuss them, is unlawful. *Viking Connectors*, 297 NLRB at 106; *Whisper Soft Mills, Inc.*, 267 NLRB at 814-815. Either way, the Employer's conduct rendered any agreement impossible.

3. The Employer's insistence upon resolving all non-economic issues before it would respond to the Union's economic proposals, while simultaneously bargaining about other economic issues, was unlawful.

The Employer's refusals to provide the Employer's positions on the Union's economic proposals until all non-economic issues were resolved forced the negotiations into a "procedural straitjacket" that was not "compatible with the statutory duty to negotiate in a manner which facilitates agreement." *Pillowtex Corp.*, 241 NLRB 40, 47 (1979), *enfd.* 615 F.2d 917 (5th Cir. 1980). "[I]t has long been that an employer may not condition bargaining over economic issues upon resolution of all noneconomic issues." *First Student, Inc.*, 359 NLRB 208, 218 (2012); *see also Erie Brush & Mfg. Co.*, 357 NLRB 363, 373 (2011), *enf. denied on other grounds*, 700 F.3d 17 (D.C. Cir. 2012) ("It is black letter law that an employer may not condition bargaining over economic issues upon resolution of all non-economic issues"); *Nansemond Convalescent Ctr., Inc.*, 255 NLRB 563, 566-567 (1981) (finding company insistence on obtaining tentative agreement on non-economic issues prior to engaging in meaningful discussion regarding economic issues unlawful); *E. Me. Med. Ctr.*, 253 NLRB 224, 245 & n.27 (1980), *enfd.* 658. F.2d 1 (1st Cir. 1981) (company's refusal to discuss economic issues until resolution reached on non-economic issues indicative of bad faith bargaining). The Board has repeatedly stated that a party may not unilaterally place a procedural constraint on the bargaining process by insisting upon the resolution of some issues before discussing others. *Hosp. of Barstow, Inc.*, 361 NLRB

352, 352 (2014), *enf. denied on other grounds*, 820 F.3d 440 (D.C. Cir. 2016) (employer violated 8(a)(5) by refusing to provide proposals until it received union's entire proposal); *Ardley Bus Corp*., 357 NLRB 1009, 1011 (2011) (violation where employer demanded union proposals in writing as a bargaining condition); *Vanguard Fire & Supply Co., Inc.*, 345 NLRB 1016, 1017 (2005), *enfd*. 468 F.3d 952 (6th Cir. 2006) (same where submission of bargaining agenda was precondition to bargaining); *Preterm Inc.*, 240 NLRB 654 & n.3 (1979); *Vanderbilt Prods., Inc.*, 129 NLRB 1323, 1329 (1961), *enfd.* 297 F.2d 833 (2d Cir. 1961). Such conduct "fragment[s] the negotiations" and "drastically reduce[s] the parties' bargaining flexibility." *John Wanamaker Philadelphia*, 279 NLRB at 1035; *see also Trumbull Mem'l Hosp.*, 288 NLRB 1429, 1446-1449 (1988); *S. Shore Hosp.*, 245 NLRB 848, 858 (1979), *enfd.* 630 F.2d 40 (1st Cir. 1980).

a. The ground rules did not require resolution of non-economic issues before economic issues could be raised.

The Employer cannot rely upon the ground rules to privilege its refusal to discuss issues that it characterized as economic. The Board has repeatedly stated that an agreement to create a procedural straitjacket on negotiations is not to be lightly inferred but, rather, must be clear and express. *Detroit Newspaper Agency*, 326 NLRB 700, 704 (1998), *enf. denied in part on other grounds,* 216 F.3d 109 (D.C. Cir. 2000) ; *Shangri-La Health Care Ctr., Inc.*, 288 NLRB 334 (1988). This is an outgrowth of the general principle that agreements purporting to be waivers of the right to bargain under the Act must be clear, explicit and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 698, 708 (1983).

The ground rules agreement in this case does not clearly and expressly state that the parties would not discuss economic topics until non-economic issues were fully resolved. Rather, it only provides that "[l]anguage proposals will be discussed prior to the discussion of

economic proposals." (G.C. Ex. 8). Indeed, the parties had ample opportunity to discuss most non-economic issues over the fourteen months following the Union's initial September 2015 proposal. It was only because of the Employer's failure to respond to a number of non-economic items in the Union's initial September 2015 proposal that the parties did not actually discuss all non-economic issues.

The Board has held many times that the fact that there was an agreement to *discuss* non-economics first does not privilege an employer to refuse to give its economic proposals until non-economic issues are *resolved*. In *Adrian Daily Telegram*, 214 NLRB 1103 (1974), the parties had agreed in the early stages of negotiations to discuss non-economic issues first, with, as here, no time limitation associated with this arrangement. *Id.* at 1111. After some discussion of non-economics, the union made an economic proposal and repeatedly attempted to discuss economic issues, but the employer did not make any economic proposal. *Id.* at 1111-1112. The ALJ found, and the Board affirmed, that the employer had violated the Act by "refusing to submit any specific economic counterproposal to the Union despite repeated requests by the Union . . . and, in addition, by refusing to bargain with respect any economic matters until final agreement had been reached on all noneconomic issues." *Id.* at 1111; *see also Teamsters Local Union No. 122*, 334 NLRB at 1254 (finding unlawful employer's failure to respond to union's requests for economic proposals and observing that "[w]hile the parties may have initially agreed to discuss noneconomic items first, there was certainly no agreement that they be done to conclusion before economic discussions commenced."); *John Wanamaker Philadelphia*, 279 NLRB 1034, 1035 (1986) (employer's refusal to discuss economics was unlawful where parties committed only to settle as many language issues as possible before moving to economics). Similarly, in *Preterm, Inc.*, 240 NLRB 654 (1979), the parties agreed to first discuss non-

economic items, *id.* at 660, but the union later asked to begin discussing economics and was repeatedly rebuffed. *Id.* at 654 & n.3. The Board held that employer had "engaged in bargaining tactics which effectively precluded the negotiation of a contract." *Id.* at 654. These cases illustrate that the Employer's reliance on the ground rules does not save its case and that the Employer's refusal to respond to the Union's September 2015 proposals on wages, benefits, and other economic items was just as unlawful as its failure to respond to many of the Union's non-economic proposals.

b. Assuming, arguendo, that the ground rules required resolution of non-economics before moving to economics, the Employer waived this requirement by raising economic issues.

Although the Union emphatically disputes the existence of an agreement to postpone any discussion of economic issues until non-economic issues were resolved, the Employer cannot rely upon such a hypothetical agreement because it initiated bargaining over several economic issues. The Employer repeatedly raised economic issues when it wished to do so, including health insurance for the interim period while negotiations continued; the August 2016 wage increase; the creation of a new classification and associated wage rate; and bereavement and jury duty leave. (Tr. 360-361; G.C. Ex. 9; G.C. Ex. 10; G.C. Ex. 32; G.C. Ex. 41; Er. Ex. 37; Er. Ex. 38). It would be illogical and contrary to the purposes of the Act to permit the Company to discuss the economic issues it wanted to discuss and simultaneously rely upon its unfounded interpretation of the ground rules to fend off the Union's attempts to discuss the Union's proposals.

c. The Union could insist upon discussing its economic proposals, and the Employer's refusal to respond was unlawful, regardless of the content of the ground rules.

Even if, *arguendo*, there were some agreement requiring resolution of language issues before economic issues could be discussed, the Union could nonetheless insist upon discussion of economic issues before resolution of language issues, and the Employer could not lawfully refuse. This conclusion is compelled by *Quality Roofing Supply Co.*, 357 NLRB 789 (2011). In *Quality Roofing*, the Board assumed that a union's breach or total repudiation of a ground rule requiring mediator presence at bargaining amounted to a breach of the union's duty to bargain in good faith. *Id.* at 789. But although the Board assumed that a ground rule required that a mediator be present at bargaining, the Board nonetheless held that the Employer violated the Act by refusing to bargain without a mediator present. *Id.*; *see also Teamsters Local Union 122*, 334 NLRB at 1254 (stating that union "unlawfully refused to discuss economics" after the employer "made perfectly clear that any such purported agreement was no longer acceptable."); *Cytec Process Materials Inc.*, 2018 WL 1517904, Case 21-CA-187639 (NLRB Div. of Judges Mar. 27, 2018).

Here, the Employer was obliged to bargain about economic issues at the Union's request, notwithstanding the content of any ground rule, in just the same way that the employer in *Quality Roofing Supply* was obligated to bargain without insisting upon the presence of a mediator. As discussed at length *supra*, the Union here repeatedly demanded to bargain about economic issues without first resolving non-economics.

In sum, the Employer's failure to state its positions with respect to many of the Union's proposals, including key economic items, made bargaining difficult, as the Union repeatedly explained in its communications to the Employer. That the Employer might eventually have

been willing to discuss some of these topics is no defense. During the bargaining that actually occurred, during which the Union asked, demanded, and implored to discuss these topics, the Employer's conduct ensured that no agreement could be reached. The Employer simply would not state what it would accept.

D. The Employer violated the Act by unilaterally laying off employees on light duty.

The Employer violated Section 8(a)(5) when it unilaterally told employees on light duty not to come to work. The Employer had a program allowing employees with medical restrictions to return to work by performing light-duty assignments. (Er. Ex. 1). Shortly before withdrawing recognition, the Employer called the five bargaining-unit employees on light-duty and told them not to report to work until their medical conditions had changed. (Tr. 64). The Employer did not notify or bargain with the Union before suspending the program.

A unionized employer may not make unilateral changes to the terms and conditions of employment without notifying and bargaining with the bargaining representative of its employees. *NLRB v. Katz*, 369 U.S. 736 (1962). In order to violate Section 8(a)(5), the unilateral change must be material, substantial, and significant. *The Bohemian Club*, 351 NLRB 1065, 1066 (2007), *citing Peerless Food Products*, 236 NLRB 161 (1978)). In deciding whether a unilateral change is material substantial, and significant, "the Board considers 'the extent to which it departs from the existing terms and conditions affecting employees.'" *Prof'l Med. Transp., Inc.*, 362 NLRB No. 19, slip op. 1 n.1 (2015), *quoting S. Cal. Edison Co.*, 284 NLRB 1205, 1205 n. 1 (1987), *enfd.* 852 F.2d 572 (9th Cir. 1988).

The unilateral change at issue here departed drastically from existing terms and conditions of employment. The Employer had allowed bargaining-unit employees with medical

restrictions to work and receive compensation. Suddenly, and without notice, the Employer decided that these employees could no longer perform light-duty assignments for pay. The Board has found that an employer's unilateral changes to light-duty and sick-leave policies departed drastically from existing terms and conditions of employment and therefore constituted material, substantial, and significant changes. *Flambeau Airmold Corp.*, 334 NLRB 165, 165-166 (2001) (finding that unilaterally changing sick-leave policy to require employees to give at least one hour advance notice from requiring employees to give as much notice as possible violated 8(a)(5)); *S. Cal. Edison*, 284 NLRB at 1211 (upholding ALJ's finding that unilaterally requiring employees with medical restrictions to perform temporary assignments rather than light-duty work violated 8(a)(5)). Similarly here, the Employer violated Section 8(a)(5) when it dramatically departed from its past practice and kept employees from working.

The Employer's unilateral refusal to make work available to light duty was material, substantial, and significant even though the Employer abruptly reversed course four days later and told the employees on light duty to return to work. The Board has found that temporary unilateral changes violate the Act. *See SMI/Div. of DCX-Chol Enter., Inc.*, 365 NLRB No. 152, slip op. 1 (2017) (upholding ALJ's finding that one-day unilateral change to union access policy violated 8(a)(5)); *Rangaire Co.*, 309 NLRB 1043, 1043 (1992), *aff*. 9F.3d 104 (5th Cir. 1992) (employer's single unilateral refusal to adhere to past practice of providing extra holiday break time violated 8(a)(5)). Most apposite are cases involving unilateral temporary layoffs, which the Board also holds to be unlawful. *E.g.*, *Monroe Mfg., Inc.*, 323 NLRB 24 (1997). Here, the Employer, on October 14, informed employees on light duty that they should not report to work for an indefinite period. Days later, having realized that this conduct violated the Act, the

Employer informed employees that they should return to work. (Tr. 583-584). This is no different from a temporary layoff.

Further, the Employer failed to adequately remedy its unlawful conduct. In order to avoid liability, an employer must rescind and effectively repudiate its unlawful conduct. *Hobson Bearing Int'l, Inc.*, 365 NLRB No. 73, slip op. 12 (2017). "The repudiation must be 'timely,' 'unambiguous,' 'specific in nature to the coercive conduct,' and 'free from other proscribed illegal conduct.'" *Id., quoting Passavant Mem'l Area Hosp.*, 237 NLRB 138 (1978) Further, "the employer must adequately publicize the repudiation to the affected employees, refrain from engaging in the proscribed conduct post-publication, and assure employees that in the future the employer will not interfere with the exercise of their Section 7 rights." *Hobson Bearing*, slip op. at 12 (internal citations omitted); s*ee also McClatchy Newspapers, Inc.*, 339 NLRB 1223 (2003), (*citing Passavant Mem'l Area Hosp.*, 237 NLRB 138, 138-139 (1978) ("The fact that the preelection status quo has now been restored does not constitute a defense to the [8(a)(5)] violation.").

Here, the Employer never repudiated it unilateral change. Instead, the Employer abruptly called the affected employees and told them to return to work, without explanation. (Tr. 604). The Employer simply reinstated the program without any acknowledgement of wrongdoing or any assurances that it would refrain from unilaterally changing terms and conditions of employment in the future. (*Id.).* Under these circumstances, the Employer sent a strong message that it could eliminate and reinstate work at will, and that the Union was powerless to stop these changes.

The Employer claims that the temporary suspension of the program was a miscommunication by an overzealous health and safety manager. But the Employer's motive is

irrelevant to the unilateral change analysis. *Baptist Hosp. of E. Tenn*, 351 NLRB 71, 78 (2007) ("motive is not an element of an 8(a)(5) violation"). Therefore, whether or not the Employer laid off light-duty workers as a result of an internal miscommunication is irrelevant; the Employer still unilaterally changed a term and condition of employment.

The Employer may also argue that it was acting in conformity with its light duty policy in sending home unit employees on light duty for whom it judged it did not have sufficient work. This is clearly insufficient because the Employer offered no evidence that it had a well-established, consistent past practice of sending employees on light duty home when it lacked work for them. Absent such an established practice of laying off light-duty employees for lack of work, the Employer was still obligated to provide advance notice and an opportunity to bargain with the Union.[21] *Champion Enter., Inc.*, 350 NLRB 788 (2007) (finding unlawful failure to bargain over short-term layoff where the employer failed to establish a well-established, consistent past practice of layoffs). Indeed, the Employer never offered any evidence that it had ever previously sent home employees on light duty for lack of work. Collura testified that he was not aware of the Employer ever sending home any employee on light duty. (Tr. 128-129).

Moreover, the Employer appears not to have followed the light-duty policy in any event. By its terms, that policy only allowed the Employer to send an injured employee home if it first "survey[ed] other departments to determine if they can use the injured employee on a light duty basis." (Er. Ex. 1). If there was no work in other departments, the Employer could send the employee home only if "there are no meaningful tasks available that the injured employee is

[21] Even if the Employer had established that such an established practice existed prior to the certification of the Union, it would not be sufficient. *See Falcon Wheel Div., LLC*, 338 NLRB 576, 577 (2002) (noting that employer has duty to bargain with a newly-certified union in advance over layoffs even if the employer contends its actions were in conformity with an established practice).

capable of performing." (*Id.*). The Employer offered no evidence that it surveyed other departments or that it lacked any meaningful work for Collura and the other five bargaining-unit employees on light duty. Indeed, the evidence suggests that the Employer had ample such work. Collura was the only employee who worked on equipment and had performed this task as part of the light-duty program for ten months. (Tr. 63, 65). When the Employer called him back to work, he continued doing the exact same job. (Tr. 68). There was no indication that the Employer had run out of work for him to do. Indeed, Georgetti testified that all five employees on light duty were returned to light duty under "the same conditions . . . which they left." (Tr. 602). There can thus be no doubt that this layoff violated the law.

E. The Employer delayed, failed, or refused to provide information relevant to collective bargaining.

The Employer additionally violated 8(a)(5) by refusing to provide information relevant to the bargaining process. To satisfy its obligation to bargain in good faith, an employer must produce information relevant to collective bargaining and contract administration upon request. The standard for relevance is a liberal, discovery-type standard. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437 (1967). Information concerning terms and conditions of employment of unit employees is presumptively relevant and an employer must furnish this information. *S. Cal. Gas Co.*, 342 NLRB 613, 614 (2004). Here, the Employer either delayed in providing or refused to provide information to which the Union was entitled.

1. The Employer unlawfully delayed and refused to provide information about employee bonuses.

By its August 12, 2016 letter, the Union asked the Employer for the date and amount of any bonus payments to individuals who were, at the time of the payment, employed in the

bargaining unit. (G.C. Ex. 2 (request numbered 2)). The Employer paid a "quarterly cash bonus" ("QCB") to unit employees each quarter, and information regarding this periodic payment was therefore presumptively relevant. (Tr. 376-377). The Union reiterated its requests for the QCB information in an August 31, 2016 letter; orally at the September 1, 2016 bargaining session; in a September 6, 2016 letter; in a September 21, 2016 letter; in an October 17, 2016 letter; orally at the October 26 bargaining session; and in an October 27 email. (Er. Ex. 3 (9/1/16; 10/26/16); G.C. Ex. 27; G.C. Ex. 28; G.C. Ex. 34; G.C. Ex. 35; G.C. Ex. 36). The Union sought to understand the Employer's total compensation practices, including bonuses, to effectively negotiate over wage increases and other subjects.[22] (Tr. at 377).

The Employer's initial response to this inquiry, contained in its September 12 letter to the Union, was to refuse to provide any information regarding bonuses because it was "irrelevant to the current negotiation regarding interim wage increases" and to state that "the company will provide this information at such time as the Parties negotiate overall economics for the collective bargaining agreement." (G.C. Ex. 37).

The Employer finally provided the date and amount of some bonus payments (those for current bargaining unit employees) at the October 27, 2016, bargaining session, almost eleven weeks after the Union originally requested the information after it failed to provide the annual wage increase. (G.C. Ex. 34). The Employer provided the information regarding payments to all employees in the unit at the time of each payment on November 1. (G.C. Ex. 34).

The Employer had an obligation to provide relevant information "reasonably promptly." *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995). An employer's unreasonable delay in providing requested information, absent a valid defense, is as much a violation of Section

[22] The Union's original September 2015 proposal included continued participation in the QCB. (G.C. Ex. 4, p. 19).

8(a)(5) as the refusal to furnish the information at all. *Am. Signature, Inc.*, 334 NLRB 880, 885 (2001). The Board routinely finds that unexplained delays of six or seven weeks are unreasonable. *See, e.g., Woodland Clinic*, 331 NLRB 735, 737 (2000) (seven week delay unlawful); *Bituminous Roadways of Colo.*, 314 NLRB 1010, 1014 (1994) (six week delay unlawful); *Bundy Corp.*, 292 NLRB 671, 672 (1989) (six week delay unlawful); *Quality Engineered Prods.*, 267 NLRB 593, 598 (1983) (six week delay unlawful); *Int'l Union of Operating Engineers, Local 12*, 237 NLRB 1556, 1558-1559 (1978) (delay unlawful when information supplied six weeks after initial request and only after charge filed). Here, the Employer inexplicably delayed about eleven weeks in providing bonus information that was within its control.

The Employer never provided a defense for its delay in providing the individual bonus amounts. The day before the Employer finally provided the information, Grimaldi briefly claimed that the bonus information was irrelevant before changing his mind and agreeing to provide the individual bonus amounts. (Er. Ex. 3 (10/26/16)). At the hearing, the Employer argued that the Union had repeatedly asked for the same information after the Employer had already provided it. (Tr. 261). But the Employer's witnesses had significant difficulty in specifically identifying instances in which the Union requested information that the Employer had already provided.[23] (Tr. 284, 286, 289-292, 565-567). Specifically, the Employer did not offer any evidence beyond generalized assertion that it provided the individual bonus amounts before October 27, 2016. (Tr. 564-565). Notably, the Employer did not inform the Union during bargaining that it believed it had already provided this information. The Employer has thus

[23] The Union sent an information request on May 1, 2015 asking for general information about the bargaining unit. (Er. Ex. 4). On August 31, 2016, the Union asked for updated responses to its May 1, 2015 request. (G.C. Ex. 27). These requests were not identical; the Union was asking for updated responses, not for the same information the Employer had provided a year before.

failed to present a valid defense for its delay of nearly eleven weeks in providing this relevant information. Therefore, this delay violated Section 8(a)(5).

In the Union's August 12, 2016 letter, it also requested the methods of the Employer used to calculate employee bonuses. (G.C. Ex. 2 (requests numbered 4 and 5)). The Union reiterated this information request in an August 31, 2016 letter; orally at the September 1, 2016 bargaining session; in a September 6, 2016 letter; in a September 21, 2016 letter; in an October 17, 2016 letter; orally at the October 26 and October 27 bargaining sessions; in an October 27 email; and orally at the November 17 bargaining session. (Er. Ex. 3 (9/1/16; 10/26/16; 10/27/16; 11/17/16); G.C. Ex. 27; G.C. Ex. 28; G.C. Ex. 34; G.C. Ex. 35; G.C. Ex. 36). The Union requested the formula and the input data in order to understand how the bonuses factored into the Employer's total compensation practices for individual employees, and to verify that the Employer was accurately portraying its practice of calculating bonuses. (Tr. 377, 380; G.C. Ex. 34). In addition, the Union had made a proposal regarding annual bonuses and wanted the current formula to effectively bargain over the subject. (Tr. 385; G.C. Ex. 4, p. 19).

At the October 26 session, Grimaldi briefly argued that the bonus formula was irrelevant, but then agreed to provide the formula. (Er. Ex. 3 (10/26/17)). Later in the session, Grimaldi, for the first time, claimed that the formula was in the employee handbook, already provided to the Union. (Er. Ex. 3 (10/26/17); G.C. Ex. 33). Upon questioning by Kilbert the following day, Georgetti clarified that the handbook language, which stated it was effective "only for FY13," was in fact still effective for the Employer's QCB program. (Tr. 379; Er. Ex. 3 (10/27/16); G.C. Ex. 33). To the extent that this response satisfied the Union's August 12 information request, it constituted an unlawful delay of almost eleven weeks. When Kilbert pointed out that the handbook did not explain how the Employer calculated individual bonus amounts, Grimaldi

promised to provide an explanation of how the calculation worked. (Tr. 380; G.C. Ex. 34; Er. Ex. 3 (10/27/16)). In violation of Section 8(a)(5), the Employer never provided the actual formula used to calculate the bonuses, which the Union had requested on August 12.

As part of the QCB discussion on October 26, Grimaldi stated that the input data used in the formula to calculate the QCB were confidential and refused to provide it on that basis. (Er. Ex. 3 (10/26/17); Tr. 380-381). When raising confidentiality concerns, an employer "must affirmatively propose an accommodation such as redactions or a confidentiality agreement. By failing to propose such accommodations, the employer waives and forgoes its opportunity to do so [assert its confidentiality interest]." *Del. Cnty. Mem'l Hosp.*, 366 NLRB No. 28, slip op. 8 (2018) (internal citation omitted). Here, the Employer never proposed any sort of accommodation. To the contrary, the Employer flatly rejected Kilbert's offer to negotiate a confidentiality agreement. (Tr. 380-381; Er. Ex. 3 (10/26/17) (Grimaldi: "We have no obligation to provide that to you as it relates to sales. We are not putting that information at risk.")). Therefore, the Employer waived its right to raise a confidentiality defense and violated Section 8(a)(5) by refusing to provide the information.

2. *The Employer unlawfully refused to provide information about competitiveness relevant to verifying assertions it made at the table.*

The Employer unlawfully refused to provide information requested by the Union on September 6, 2016, relevant to verifying its assertions regarding the Employer's competitiveness in connection with the August 2016 wage-increase bargaining. A party is entitled to information useful to evaluate the factual basis of claims made at the bargaining table, even if this information is not presumptively relevant. "If … an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its

accuracy." *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-153 (1956). The Board has long recognized that when an employer makes statements at the table about competitiveness or other topics, the Union is entitled to request information concerning competitors and other information necessary to evaluate the factual basis for the employer's claims. *See, e.g., Whitesell Corp.*, 357 NLRB 1119, 1166 (2011); *KLB Indus., Inc.*, 357 NLRB 127, 128 (2011), *enfd.* 700 F.3d 551 (D.C. Cir. 2012); *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006) (finding employer violated the law by failing to produce information made relevant by employer's representations during bargaining); *Calmat Co.*, 331 NLRB 1084, 1096 (2000); *E.I. Du Pont De Nemours & Co.*, 276 NLRB 335, 341 (1985).

The Employer's bargaining notes reflect that, on August 26, Grimaldi represented that the Employer's customers would not absorb the cost of the Union's $0.60 proposed wage increase in addition to the Employer's increased health insurance costs, and that the Employer did not wish to pass the increase and cost to the customer. (Er. Ex. 3 (8/26/16)). Kilbert testified that Grimaldi stated that "the Employer's customers would not understand a 15 percent price increase." (Tr. 391). When Kilbert asked Grimaldi to confirm that he was saying that the Employer did not wish to pass along increased costs to its customers, Grimaldi confirmed that this was correct and added that "the Employer had to remain competitive." (Tr. 391). In a letter dated September 30, Grimaldi acknowledged that the Employer had "stated at the table that no customer would understand a 15% price increase." (G.C. Ex. 38). By positing a connection between the Employer's wage rate proposals and health insurance costs, the Employer's prices for its customers, and the Employer's competitive position, Grimaldi's August 26 statement rendered information related to prices and competitiveness relevant for bargaining. *See Truitt*,

351 U.S. 152-153. The Union requested several items related to these topics by letter of September 6. (G.C. Ex. 36 (requests 1-2, 4-5, 6-8).

The Employer refused to provide this information on the ground that it was irrelevant and confidential on September 12.[24] (G.C. Ex. 37). When, at the September 12 bargaining, the Union offered to bargain a suitable confidentiality agreement, the Employer refused to do so on the ground that the information was irrelevant. (Tr. 403). The Union reiterated this offer and explained the relevance of the information by letter of September 21. (G.C. Ex. 35). The Employer never produced the information to which the Union was entitled. (Tr. 395). It thereby violated Section 8(a)(5).

3. The Employer unlawfully failed to provide information related to health insurance benefits.

The Employer unlawfully failed to provide information related to health insurance benefits requested by the Union on August 31, 2016. On that date, the Union requested "all health insurance plans, summary plan descriptions, and employee and employer premium contributions for plans applicable to unit employees in 2013, 2014, 2015, and 2016." (G.C. Ex. 27 (request 3)). "Summary plan descriptions" are distinct from "insurance plans" in that insurance plans are quite detailed and contain all information regarding the plan, while a summary plan description is often a short description that summarizes the benefit. (Tr. 388). Georgetti testified that he understood that a health insurance plan document is a "detailed document explaining the full scope of the benefits." (Tr. 598-599).

The Union also requested all written communication to employees announcing or explaining changes to healthcare from 2013 through the date of the request. (G.C. Ex. 27

[24] The Employer did respond to say that it had no documents responsive to requests 6 and 7 of the Union's September 6 information request. (G.C. Ex. 37).

(request 8)). The Union reiterated this request orally at the September 1 bargaining session and in a September 6 letter. (Er. Ex. 3 (9/1/16); G.C. Ex. 36). On September 12, the Employer provided the requested premium contribution information, summary plan descriptions for plans available during the period June 1, 2013 through 2016, and written communications related to open enrollment for health insurance in 2015 and 2016. (Er. Ex. 20; Er. Ex. 61; Tr. 387-389). The Employer did not provide the insurance plans, the summary plan description for the plan applicable from January 1, 2013, through May 31, 2013, or written communications related to open enrollment for 2013 or 2014. (Tr. 387-388). By letter dated September 21, the Union pointed out the Employer's failure to provide the written open enrollment communications for 2013 and 2014. (G.C. Ex. 35). The employer never provided this information. (Tr. 390). Georgetti admitted that the Employer never provided copies of its insurance plans to the Union. (Tr. 599).

The Employer never explained to the Union why it failed to provide the health insurance information. At the hearing, Georgetti testified that the plan summaries were responsive to the Union's request for information related to open enrollment communications, but the Employer never informed the Union of this fact. (Tr. 581). The Employer's September 12 information request specifically stated that those documents responsive to the Union's request for open enrollment communications were enclosed in the attachment marked "C." (Er. Ex. 20). The attachment marked "C" included only open enrollment communications related to 2015 and 2016 open enrollment. (Er. Ex. 61). Georgetti also testified that he did not recall that the Union had requested copies of the insurance plans. (Tr. 599). But the Union's August 31 information request explicitly sought "health insurance plans" as a distinct item from "summary plan

descriptions." (G.C. Ex. 27). The Employer's failure to provide this requested health benefit information therefore violated Section 8(a)(5).

F. The Employer violated the Act by maintaining a confidentiality policy forbidding employees from disclosing staff information, including contact information.

The Employer's Confidentiality Statement facially restrains employees from organizing amongst themselves and therefore the Employer's maintenance of the policy violates Section 8(a)(1) of the Act. In *Boeing Co.*, 365 NLRB No. 154 (2017), the Board identified rules that prohibited individuals from discussing wages or benefits with one another as never permissible. Slip op. at 4 (categorizing such rules as Category 3 rules). The Employer's Confidentiality Statement here provides that "all . . . staff information is confidential and may not be disclosed to anyone, except where required for a business purpose." (G.C. Ex. 11). Wages and other information about the benefits employees receive are manifestly "staff information" that the Confidentiality Statement restrains employees from discussing. Accordingly, *Boeing* makes clear that the Employer's maintenance of this policy is unlawful.

The Confidentiality Statement further provides that "personal employee information, such as address, phone numbers, social security numbers, etc., is not to be discussed, copied, released or provided to any other employee within the Company." (G.C. Ex. 11). The Confidentiality Statement thus facially prohibits employees from disclosing the addresses or phone numbers of other employees to each other. Such a prohibition strikes at the core of employee organizing efforts protected by Section 7 by forbidding employees from distributing contact information to aid in efforts at self-organization. *See Certified Grocers of Ill., Inc.,* 276 NLRB 133, 238 (1985), *enf. denied on other grounds,* 806 F.2d 744 (7th Cir. 1986) (finding such a rule invalid on its face); *Great Atl. & Pac. Tea Co.,* 123 NLRB 747, 756-757 (1959), *enfd.*

277 F.2d 759 (5th Cir. 1960) (same). Indeed, employee Don Crispell testified that he understood that the Employer's policy forbade employees from giving out other employees' contact information. (Tr. 794). The Confidentiality Policy is therefore unlawful for this reason as well.

The Employer did not attempt to introduce evidence of any legitimate justifications associated with the Confidentiality Policy, but, in any event, the Policy is unlawful irrespective of any justifications that the Employer could offer. That is the teaching of *Boeing*, which forbids any rules prohibiting employees from discussing their wages and benefits, as the Confidentiality Statement does in the instant case.

G. The Employer violated the Act by arriving late to nine bargaining sessions.

In addition to maintaining an unlawful Confidentiality Policy, refusing to provide information, unilaterally suspending its light-duty program, refusing to discuss mandatory subjects of bargaining, and failing to pay the annual August wage increase, the Employer also arrived late to nine bargaining sessions. Unlike the Union, the Employer refused to start negotiating unless every member of its bargaining team was present. (Tr. 58-59). Therefore, the Employer's late arrivals impeded the pace of bargaining.

Section 8(d) of the Act requires an employer to "meet at reasonable times." The Board "considers the totality of the circumstances when determining whether a party has satisfied its duty to meet at reasonable times." *Garden Ridge Mgmt., Inc.*, 347 NLRB 131, 132 (2006), *citing Calex Corp.*, 322 NLRB 977, 978 (1997), *enfd.* 144 F.3d 904 (6th Cir. 1998). The Board's inquiry "is not limited to the number of bargaining sessions held." *Id.* Here, the Employer arrived late while also refusing to provide its position on mandatory subjects of bargaining and implementing unilateral changes. In this context, the Employer's tardiness contributed to the inability of the parties to reach an agreement and violated 8(a)(5).

H. The Employer's unfair labor practices tainted its withdrawal of recognition.

The Employer's unfair labor practices tainted the employee petition on which the Employer relied in withdrawing recognition. The Employer therefore violated the Act by refusing to recognize the Union after November 2016. *See Wire Products Mfg. Corp.*, 326 NLRB 625, 627 (1998), *enfd.* 210 F.3d 375 (7th Cir. 2000) (stating that an employer cannot withdraw recognition on the basis of employee disaffection attributable to the employer's unfair labor practices). The Board does not probe the subjective state of mind of employees but instead applies an objective standard, asking what effect the specific unfair labor practices would reasonably have upon the employees. *AT Sys. W., Inc.*, 341 NLRB 57, 60 (2004); *see CoServ Elec.*, 366 NLRB No. 103, slip op. 3 n.10 (2018); *Bunting Bearings Corp.*, 349 NLRB 1070, 1072 (2007); *St. Gobain Abrasives Inc.*, 342 NLRB 434, 434 n.2 (2004); *Wire Prods.*, 326 NLRB at 627 n.13 . Under *Master Slack Corp.*, 271 NLRB 78 (1984), the Board considers a number of objective factors in determining whether an employer's unfair labor practice caused the withdrawal of recognition: (1) the length of time between the unfair labor practice and the withdrawal of recognition; (2) the nature of the violations; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of unlawful conduct on employees' morale, organizational activities, and membership in the union. *Id.* at 84. Hallmark violations of the Act are not necessary so long as the factors lead to the conclusion that a withdrawal of recognition was unlawful. *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 651 (D.C. Cir. 2013). The *Master Slack* factors weigh heavily in favor of a finding that the Employer's withdrawal of recognition was tainted by its unfair labor practices in this case. Indeed, the facts here present an even stronger case that the Employer's unfair labor practices tainted the petition than in the Board's June 12, 2018, decision in *CoServ Electric*, 366 NLRB No. 103 (2018), where the Board relied

solely on the employer's unilateral discontinuance of its annual increases in employees' wage rates and on a supervisor's statements blaming the Union for the lack of raises. Slip op. 2-3.

With respect to the first factor, the Employer's unfair labor practices occurred during the same time as the circulation of the petition calling for withdrawal of recognition. The Employer's refusal to respond to many of the Union's September 2015 proposals, including its refusal to discuss the Union's economic proposals, was continuing throughout the period. In *Fruehauf Trailer Services, Inc.*, 335 NLRB 393 (2001), the Board held that an Employer's practice of failing to meet at reasonable times that was ongoing at the time of the petition tainted the withdrawal of recognition almost by itself.[25] *Id.* at 394; *see also Railserve, Inc.*, 2016 WL 7634523, 04-CA-161485 (NLRB Div. of Judges Dec. 30, 2016). The suspension of the light-duty program also occurred while the petition was circulating, approximately one month before the withdrawal of recognition. *See Broadway Volkswagen*, 342 NLRB 1244, 1247 (2004), *enfd.* 483 F.3d 628 (9th Cir. 2007) (unilateral changes one month before withdrawal of recognition supported finding of taint).

In addition, employees still had not received the annual August wage increase. The Board's statement in *CoServ* applies equally here:

> [E]ach time the employees received a paycheck without the customary annual raise, they were reminded of the Union's ineffectiveness in preserving such raises, let alone in obtaining additional wage increases. As the Board held in *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1067 (2001), "the possibility of a detrimental or long-lasting effect on employee support for the union is clear" where the employer's unlawful unilateral conduct, like here, suggests to "employees that their union is irrelevant in preserving or increasing their wages."

Slip op. 3 (footnote omitted).

[25] The only other unfair labor practice was a *Weingarten* violation two months previously. 335 NLRB at 394.

As to the second factor, the Employer's unfair labor practices are of a nature that have a "possibility" of a "detrimental or lasting effect upon employees." *AT Sys. W.*, 341 NLRB at 60. The effect of the Employer's refusal to respond to the Union's economic and non-economic proposals for over a year *literally made it impossible to reach any agreement*. The Union could not accept proposals that the Employer never saw fit to offer. This was obviously detrimental to employees, and under similar circumstances, the Board held that an employer's refusal to offer a wage proposal for months rendered a subsequent withdrawal of recognition unlawful. *See also Whisper Soft Mills*, 267 NLRB at 816. In addition, the withholding of the August annual wage increase had an ongoing detrimental effect upon employees -- their wallets were lighter than they would have been if the Employer had offered notice and an opportunity to bargain with the Union. "[S]uch a unilateral change, particularly where the Union was bargaining for a first contract, is likely to have a lasting effect on employees." *CoServ*, slip op. 3; *see also Broadway Volkswagen*, 342 NLRB at 1247. Further, the unexplained layoff of light-duty employees, too, was of a nature to have a lasting and significant impact on the five affected employees and, because it removed the Union's leader from the facility, upon the rest of the unit, as well.

Turning to the third factor, the Employer's unfair labor practices tended to cause employee disaffection. This is an objective test, not a subjective one. *Wire Prods.*, 326 NLRB at 627 n.13. The Board assesses "the tendency of unfair labor practices to cause disaffection, instead of relying on employees' recollection of subjective motives for withdrawing support from the union." *Comau, Inc.*, 357 NLRB 2294, 2298 (2012), vacated on other grounds, 358 NLRB 593 (2012). Individual employees' testimony cannot undermine findings of a causal relationship between the unlawful conduct and employee disaffection. *Hillhaven Rehabilitation Ctr.*, 325 NLRB 202 (1997), *enf. denied in part on other grounds*, 178 F.3d 1296 (6th Cir. 1999).

The Employer's fragmented approach to bargaining unlawfully delayed the bargaining process in a way likely to promote employee disaffection. "The Board has long recognized that dilatory bargaining tactics . . . have a tendency to invite and prolong employee unrest and disaffection from a union." *Fruehauf*, 335 NLRB at 394. The Board held in *Fruehauf* that the employer's failure to meet at reasonable times conveyed "the message that union activity is futile, and would clearly tend to undermine the employees' confidence in the effectiveness in their selected collective-bargaining representative." *Id.* at 394-395. This is only common sense, as the Board has recognized repeatedly over the years. *See, e.g.*, *Lee Lumber & Bldg. Material Corp.*, 322 NLRB 175, 177 (1996), *aff'd in relevant part* 117 F.3d 1454 (D.C. Cir. 1997) ("[D]elays in bargaining deprive the union of the ability to demonstrate to employees the tangible benefits to be derived from union representation. Such delays consequently tend to undermine employees' confidence in the union by suggesting that any such benefits will be a long time coming."); *The Westgate Corp.*, 196 NLRB 306, 313 (1972) (stating that when an employer delays bargaining, "unrest and suspicion are generated, the conclusion of an agreement is delayed, and the status of the bargaining representative is disparaged").

The Board recently recognized the Employer's unilateral failure to pay the annual wage increase in August 2016 as a type of conduct that fuels employee disaffection. *CoServ*, slip op. 3. This is particularly true in view of Brink's and Georgetti's statements to different employees that they were not receiving the annual wage increase in August because of negotiations with the Union. (Tr. 137, 304-305). Such statements were also considered to support a finding of taint in *CoServ*, slip op. 8 (describing supervisor's comments that employee would not receive a raise "because it's tied up in union and CoServ negotiations").

The layoff of light-duty employees in October 2016 also tended to promote employee disaffection. It resulted in the absence from the facility of over 5 percent of the workforce, including the Union's top leader at the plant. Less serious unilateral changes have supported findings that withdrawals of recognition were unlawfully tainted. *See Strategic Res., Inc.*, 364 NLRB No. 42, slip op. 24-25 (2016) (stating unilateral change in holiday pay as a "most serious violation that strikes at the heart of the Union's legitimate role as representative of employees")[26]; *Ardsley Bus Corp., Inc.*, 357 NLRB 1009, 1012 (2011) (unilateral change of failing to post of certain routes for school bus drivers) *Lexus of Concord, Inc.*, 330 NLRB 1409, 1416 (2000) (finding unilateral change in 401(k) proximate in time to employee petition is likely to undermine employee support for the Union).

The Board has stated that the General Counsel need not show employee awareness of unfair labor practices. See *Hearst Corp*., 281 NLRB 764, 765 (1986), *aff'd* 837 F.2d 1088 (5th Cir. 1988)) ("[W]e are unwilling to allow the Respondent to enjoy the fruits of its violations by asserting that certain of its employees did not know of its unlawful behavior, but rather shall hold it responsible for the predictable consequences of its misconduct."); see also *Wire Prods.*, 326 NLRB at 630 n.13, enfd. 210 F.3d 375 (7th Cir. 2000), citing *Fabric Warehouse,* 294 NLRB 189 (1989), *enfd.* 902 F.2d 28 (4th Cir. 1990). Further, as stated in *Vanguard Fire & Supply Co., Inc.*, 345 NLRB 1016 (2005) *enfd.* 468 F.3d. 952 (6th Cir. 2006):

> Moreover, considering the small size of the bargaining unit in this case, and further considering that Respondent's refusal to negotiate affected every employee represented by the Union, it appears inevitable that word of the unfair labor practice would spread quickly throughout the unit. Additionally, even assuming for analysis that the employees did not know that Respondent was refusing to bargain, the effects of this refusal would still produce discontent. The very

[26] In another parallel to the instant case, *Strategic Resources* also relied upon the employer's failure to provide information necessary for bargaining as a factor in causing employee disaffection. 364 NLRB slip op. 25. The Board also identified ongoing failures to provide information were also identified as a factor in *Ardsley Bus Corp., Inc.*, 357 NLRB 1009, 1012 (2011).

> absence of any news that negotiations were progressing certainly would increase employee doubts about the Union's ability to effect change in the workplace.

Id. at 1045.

Moreover, the employees were certainly aware of the Employer's unfair labor practices in this case. The Union's bargaining updates informed employees of the Employer's unfair labor practices. These updates, which Collura circulated to approximately thirty unit employees via email, explained that the Employer had failed to bargain over the August 2016 wage increases; that the Employer was refusing to give the Union information to which it was entitled; that the Employer was delaying providing responses to the Union's outstanding economic and language proposals; and that the Employer had unilaterally sent home employees on light duty. (G.C. Ex. 6; G.C. Ex. 7; Tr. 77, 399). The Union's November 2016 mailing to all unit members also recounted the Employer's refusals to provide information relevant to the wage bargaining. (G.C. Ex. 6; Tr. 400).

Beyond the Union's efforts to inform employees, the entire unit became aware that they did not receive the August 1, 2016, annual raises when their pay was unchanged on the next payday. Mewhort testified that Brink informed him that the employees "weren't receiving raises at that time because the Union was currently negotiating for us." (Tr. 147). He further testified that he told Berlew, at the time he signed the petition, that he was signing because "we were fucking losing things." (Tr. 149). By this, he testified that he meant "we hadn't gotten raises yet." (*Id.*). Lewis testified that the topic of the wage increase was something "a bunch of us were talking on the floor about." (Tr. 303-304). He testified that in late August, he asked Georgetti about the wage increase in front of a number of other employees, and Georgetti said that the raise was "in negotiations" with "you know who." (Tr. 304-305). Lewis reported this conversation to other employees, as well. (Tr. 306). Even Berlew testified that he was aware

that the wage increase was not given in August 2016 because they were being negotiated. (Tr. 182-183).

Employees would also have noticed the absence of the five individuals on light duty, and Collura testified that the topic was discussed among the plant at large. (Tr. 69). Dramatizing the impact of this change, specifically, upon employee sentiment, it is notable that approximately 10 of 23 signatures occurred on October 14, the day that employees on light duty were told not to come in, and that a further five occurred within a week of that date. (Er. Ex. 2). It is particularly significant that Filipkowski, one of the individuals on light duty whom the Employer had kept out of the facility, signed the petition on October 20, the day after he was returned to work. (Er. Ex. 2).

Further, the Employer's delays in responding to the Union's September 2015 proposals and its fragmentation of bargaining, resulting in its refusals to discuss the Union's economic proposals, meant that employees were waiting for an agreement. Lewis testified that he formed the impression that bargaining was proceeding slowly and that the parties had not even begun discussing important things, like wages and benefits. (Tr. 306-307). Mewhort testified that he also understood that negotiations "were going slowly." (Tr. 148). Bukowski, another petition signatory, texted shortly after the Employer withdrew recognition and connected his lack of support for the Union to the slow pace of negotiations. (Er. Ex. 2; G.C. Ex. 5). There is thus ample evidence that employees were aware of these very serious unfair labor practices, which were obviously of a nature that would cause employee disaffection.[27]

[27] The fact that the Company's unfair labor practices doubtless were not the sole factor behind employees' loss of support for the Union does not negate the factors supporting finding a causal relationship between the Company's unlawful conduct and the employees' expression of disaffection. The withdrawal of recognition is unlawful where the unfair labor practice was a substantial and aggravating cause of the Union's loss of majority support, even if it was not the only cause. *See Hillhaven Rehabilitation Ctr.*, 325 NLRB at 205: "Evidence that [an employee] initiated the petition effort for reasons other than the Respondent's unfair labor practices, or that these reasons may also have influenced other employees who signed the petition does not negate the factors supporting the

Closing with the fourth factor, the Employer's unfair labor practices actually affected employees' morale, organizational activities, and union membership. The Union's organizational activities showed a marked decline after the unfair labor practices began.[28] The Union held a meeting for unit employees in October 2015, shortly after bargaining began, that was attended by approximately a dozen employees. (Tr. 81). A year later, while the Employer's unfair labor practices were ongoing, only about six employees attended a second meeting. (Tr. 81). Even more telling is the reduced response to the Union's call for feedback on its bargaining position. In mid-November 2016, the Union mailed a letter to all unit employees asking them to text Collura to give feedback on the Union's negotiating position on the August 2016 annual wage increase. (G.C. Ex. 6 ("2016 Wage Increase Update, Your Vote Needed"); Tr. 400). Of the forty-three employees in the unit, only about six responded to this mailing by texting Collura. (Tr. 77-78; Er. Ex. 36). This was a marked decrease from the thirty employees who had told Collura that they wanted to receive email updates on negotiations. (G.C. Ex. 7; Tr. 79-80).

All four of the *Master Slack* factors thus strongly favor the conclusion that the Employer's unfair labor practices tainted the petition. Consequently, the November 29 withdrawal of recognition was unlawful.

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finding of a causal relationship between the Respondent's unlawful conduct and the employees' expression of disaffection"), See also *Tenneco Automotive*, 357 NLRB 953, 960 (2011), enfd. den. 716 F. 3d 640 (2013) (finding causal nexus between disaffection and unfair labor practices, despite evidence that other factors may have contributed to the disaffection.).

[28] The Employer may argue that the close margin of the 2014 election weighs against the conclusion that its unfair labor practices caused a decline in support for the Union. This argument was considered and rejected in *Liberty Bakery Kitchen, Inc.*, 366 NLRB No. 19 (2018), where the ALJ stated as follows:

> The Respondent's argument that there was bound to be a loss of support, due to the close election tally in May 2015 and the subsequent failure of the parties to achieve a collective-bargaining agreement in the first year is speculative and misplaced. There is no basis to assume in the absence of reliable, objective evidence that either support/nonsupport for the Union remained steady after the Union was certified or that any employees changed their allegiances.

Slip op. 11 n.25.

IV. CONCLUSION

The Employer has not met its burden of establishing that it lawfully withdrew recognition because it lacked objective evidence that a majority of employees no longer supported the Union. It relied solely upon a petition that included many signatures on blank pages containing no indication, one way or another, of employees' support for the Union.

In addition, the Employer unlawfully unilaterally withheld the established August 2016 wage increases; it unlawfully unilaterally laid off five employees on light duty; and it unlawfully refused to respond to many of the Union's September 2015 proposals, including all of the Union's most important economic proposals. These unfair labor practices tainted any withdrawal of recognition. Notably, the unfair labor practices committed by the Employer in this case are significantly more far-reaching than those the Board just found tainted withdrawal of recognition in *CoServ*.

In view of the foregoing, the Union seeks an affirmative bargaining order and a notice reading, both of which were recently granted in *CoServ*. In addition, the Union seeks all other appropriate remedies, including an order requiring that employees be made whole.

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Respectfully submitted,

/s/Antonia Domingo

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CERTIFICATE OF SERVICE

I, Antonia Domingo, hereby certify that on this 15th day of June 2018, a true and correct copy of the foregoing was served upon the following via electronic mail:

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